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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1901~~ 1902.

No. ~~128~~ 102.

THE BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING COMPANY, PLAINTIFF IN ERROR,

vs.

THE MONTANA ORE PURCHASING COMPANY, F. AUGUSTUS HEINZE, AND ARTHUR P. HEINZE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

FILED MAY 21, 1901.

(18,174.)

(18,174.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 19, 1901.

1 Pleas before the Honorable Hiram Knowles, judge of the district court of the United States for the district of Montana, sitting in the circuit court of the United States for the district of Montana, within the ninth judicial circuit, at the February term, 1901, thereof.

2 Be it remembered that on the 29th day of March, 1898, the plaintiff herein filed its amended complaint which said amended complaint is in the words and figures as follows, to wit:

3 In the Circuit Court of the United States, Ninth Circuit, District of Montana, Southern Division.

Boston and Montana Consolidated Copper and Silver Mining Company, Plaintiff, *vs.* Montana Ore Purchasing Company, F. Augustus Heinze, and Arthur P. Heinze, Defendants.	Complaint.

Now comes the above-named plaintiff by this its amended complaint, by leave of court first had and obtained, and complains of the above-named defendants, and for cause of action alleges:

That this plaintiff is now and at all times hereinafter mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of Montana, with its principal place of business at Butte city, Silver Bow county, in the State of Montana.

That the defendant, The Montana Ore Purchasing Company, is now and at all times hereinafter mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of Montana with its principal place of business at Butte city, in Silver Bow county, in the State of Montana.

That the defendants F. Augustus Heinze and Arthur P. Heinze are officers of the said defendant, Montana Ore Purchasing
4 Company, and in charge of its operations and affairs.

That at all times hereinafter mentioned the plaintiff was and now is the owner of that portion of that certain quartz lode mining claim, situated in Summit Valley mining district in Silver Bow county in the State of Montana, and known and called the Pennsylvania Lode claim, lot number 172, in township three, north of range seven west, principal meridian for Montana, and which is particularly bounded and described as follows, to wit:

Beginning at corner number one, from which the quarter-section corner on north boundary of section eighteen in township three north of range seven west of the principal meridian Montana, bears north three degrees fifty-seven minutes west, seven hundred and thirteen (713) feet distant, and corner number three of lot number 64, the St. Lawrence Lode claim, and corner number 2 of lot number 126, the Little Ida Lode claim, bear north eighty-three degrees ten minutes east, four hundred and forty-nine (449) feet distant. Thence first course, magnetic variation 19 degrees 45 minutes east, south

88 degrees 15 minutes east 56 feet to a point on east end line of lot 147, the Rob Roy Lode claim; for point of intersection of said lots 147 and 172, from which corner number 5 of said lot 147 bears south 11 degrees east, two hundred and ninety-six (296) feet distant; one thousand five hundred (1500) feet to corner number two. Thence second course, magnetic variation 20 degrees east, south 4 degrees 30 minutes west 564.6 feet to a point on north boundary line of mineral application 722, a placer claim, from which the northwest corner of said mineral application 722, which is also the northeast corner of mineral application 686, a placer claim, bears west 183.9 feet distant; six hundred (600) feet to corner number three. Thence third course, magnetic variation 20 degrees, east, north 88 degrees 15 minutes west 181.3 feet to a point on the west boundary line of said mineral application number 722, and east boundary line
5 of said mineral application 686; from which the northwest corner of said mineral application 722 and the northeast corner of said mineral application 686 bears north 29.8 feet distant, nine hundred and twenty-four (924) feet to a point over a tunnel, from which the mouth of said tunnel bears south 58 feet distant, eleven hundred and fifty-six and two-tenths (1156.2) feet to a point on the north boundary line of said mineral application 686, from which the northeast corner of said mineral application 686 bears east 974.4 feet distant, fifteen hundred (1500) feet to corner number four, from which the southwest location corner bears south four degrees 30 minutes west 48 feet distant discovery shaft bears north 70 degrees 30 minutes east 827 feet distant; corner number five of said lot 147 bears north 27 degrees 30 minutes east 344 feet distant, and corner number three of lot 146, the Grant Extension lode, bears south 36 degrees 45 minutes west 152 feet distant. Thence fourth course, magnetic variation 20 degrees east, north 4 degrees 30 minutes east 325 feet to a point on south side line of said lot 147, for point of intersection of said lots 147 and 172, from which corner number five of said lot number 147 bears south 82 degrees 4 minutes east 135 feet distant; six hundred feet to corner number one, the place of beginning. Expressly excepting and excluding herefrom all that portion of the ground heretofore described, embraced in said mining claim of lot number 147; also mineral applications number- 686 and 722; and also that portion of said Pennsylvania vein or lode, and also all veins, lodes or ledges throughout their entire depth, the tops or apexes of which lie inside of said excluded ground. Also excepting and excluding herefrom all that portion of the said above-described Pennsylvania Lode claim, described as follows, to wit: Beginning at the northeast corner of lot number 172 and running thence north
88 degrees 15 minutes west 130 feet; thence south 69 degrees
6 25 minutes east 136 feet; thence north 4 degrees 30 — east
44 feet to the place of beginning, and containing an area of $\frac{7}{10}$ of an acre of ground.

That heretofore, to wit, on or about the — day of —— 1895, the said defendants, wrongfully and unlawfully entered on and into the said premises hereinbefore described by underground workings and by tunnels, shafts, drifts, levels, and cross-cuts and ex-

tracted therefrom large quantities of valuable ores, containing copper, silver and other precious metals against the will, wish and consent of this plaintiff.

That by means of such underground workings, the said defendants have extracted from within the limits of this plaintiff's said premises hereinbefore described, one hundred and fifty thousand tons of ore, more or less and of the reasonable value of five hundred thousand dollars ($500,000.00) and have converted the same to their own use and have smelted and reduced the said ores and taken the proceeds thereof and converted the same to their own use.

That by reason of said trespasses this plaintiff has been damaged in the sum of five hundred thousand dollars, and that the said defendants have not paid the same or any part thereof.

That plaintiff did not discover the facts constituting the said trespass and did not know thereof until on or about the first day of December, 1896.

That the determination of the said controversy between the said plaintiff and the said defendants, involves the construction of title twenty-three, chapter VI of the Revised Statutes of the United States, concerning mines and mineral lands, in this, to wit:

That the said Pennsylvania Lode claim owned and claimed by the plaintiff, as hereinbefore alleged, is a mining claim duly located under the provisions of the statutes of the United States, relative to the appropriation of mineral lands and that the
7 same has been patented as a mining claim, under the provisions of said statutes.

That the said defendants own or claim to own a portion of that certain quartz lode claim, known as and called the Rarus Lode claim, lot number 179; and also a portion of that certain quartz lode claim known as and called the Johnstown Lode claim, lot number 173; and also a portion of the Little Ida Lode mining claim, lot number 126; and which said claims lie north of and partially adjoining and near to the said Pennsylvania Lode claim, on the north. That plaintiff is not acquainted with the metes and bounds of the said ground owned or claimed by the defendants.

That the said Rarus Lode claim, Johnstown Lode claim, and the Little Ida Lode claim, are mineral claims located under the laws of the United States relative to the appropriation and location of mineral lands and plaintiff is informed and believes and therefore alleges that the said claims or some of them have been patented by the United States to various parties, and that such patents were issued under and by virtue of the statutes of the United States, relative to the patenting of mineral lands upon the public domain.

That as plaintiff is informed and believes and therefore alleges, the said defendants claimed the right to enter upon the premises of this plaintiff, to wit, that portion of the Pennyslvania Lode claim above described, by reason of the fact that certain veins, owned or claimed by the defendants or in their possession have their tops or apexes within the ground owned or claimed as a part of the Rarus Lode claim, a portion of the Johnstown Lode claim, or a

portion of the Little Ida Lode claim, and that defendants assert the right to follow such veins on their downward courses or dips, although the same so far depart from a perpendicular as to depart from the ground owned or claimed by the defendants, and enter the premises owned or claimed by this plaintiff, to wit, that
8 portion of the Pennsylvania Lode claim hereinbefore described.

But plaintiff denies and disputes the fact that the said veins upon which the defendants have mined within the lines of the Pennsylvania Lode claim, even if such veins have their apices in defendants' ground, which plaintiff does not admit, are such veins as can be followed on their dip beyond the lines of the defendants' possessions and into the ground or premises of this plaintiff; but alleges the facts to be that the said veins are broken and intersected by faults in such a manner that the same cannot be traced or followed from the ground of the defendants into the Pennsylvania Lode claim and that therefore the said defendants have no right to enter upon the ground of this plaintiff, to wit, the said Pennsylvania Lode claim, for the purpose of extracting ores therefrom, by reason of their ownership of the apices of any veins within their ground.

And this plaintiff further shows that the veins upon which the defendants have been extracting ore within the premises of this plaintiff, if they or any of them have their apices on defendants' ground, which plaintiff does not admit, do not in their course or strike depart from the end lines of the defendants' claims or possessions, but that the same depart from the side lines of such claims in such a manner as to prohibit the said defendants from following the same beyond the said lines of their own possessions or claims, into plaintiff's portion of the said Pennsylvania claim.

That there are several veins which the defendants claim the right to follow on their dip beyond the side lines into the ground of this plaintiff, the said Pennsylvania Lode claim, but that neither of the said veins in their course or strike depart from the end lines of the said claim- or possessions of the defendants, if they have their apices within defendants' premises at all, but
9 plaintiff alleges that the ground claimed by the defendants was not so located or situated as to have any end lines whatever, as provided by the statutes of the United States in such cases, and that in pursuance of such fa'lure upon the part of the locator or locators of the ground or claims owned or claimed by the defendants, to mark the same with end lines parallel or to locate the same along the veins, but on the contrary having located the same across the veins, the said defendants have no extralateral rights in or to any of the veins in their said ground, and are not entitled to follow the same into or upon the ground of this plaintiff, the said portion of the Pennsylvania Lode claim.

And plaintiff further shows that a patent was issued by the United States to Stanislas E. Hirbous and others to that certain quartz lode claim known as and called the Rarus Lode claim,

hereinbefore referred to, a copy of which patent is hereto attached marked Exhibit "A" and made a part of this complaint.

And plaintiff further shows that a patent has been granted by the United States to William Harris, Sr., and others for that certain quartz lode claim known as and called the Johnstown Lode claim, a copy of which patent is hereto attached marked Exhibit "B" and made a part of this complaint.

And as showing that the questions involved in this controversy are questions arising under the statutes of the United States and involving the construction thereof, plaintiff shows and alleges that the said defendants herein claim to own a portion of the ground patented under both the said Johnstown and Rarus patents and that by virtue of said Rarus patent they, the said defendants, have acquired 1318 linear feet of what is designated and called the Rarus lode, and it is contended by the said defendants that under and by virtue of the said Rarus patent they and their predecessors in interest were granted 1318 linear feet to the Rarus lode,
10 extending from what is known as the east end line of the Rarus claim to an imaginary or projected line of the Rarus location.

And plaintiff further shows that the surface ground patented to the predecessors in interest of the defendants, to the Rarus Lode claim, does not include to exceed more than three hundred feet of the said Rarus lode, as shown in yellow shading on the map, attached to the Rarus patent, but that notwithstanding the fact that the surface ground granted by the said Rarus patent did not cover or extend over the said Rarus lode the defendants contend and claim that the said patent of the Rarus claim granted to them and their predecessors in interest the said Rarus lode beyond the surface ground granted by the Rarus patent and to the full extend of 1318 linear feet, and also contend and claim that by reason of the ownership of the said lode for the length aforesaid, and that by reason of the fact that the same passes through the east end line of the Rarus claim, as patented and the west end line of the original location of the said claim, that they are entitled to follow said veins on their course or dip into the earth and without the lines of the Rarus claim, both as originally located and as patented.

Plaintiff further shows that a large quantity of the ground which it is claimed by the defendants was originally included within the location of the Rarus claim, has been patented under the said Johnstown patent, hereinbefore referred to and as shown by the portion shaded in yellow on the plat attached to the said Johnstown patent. That notwithstanding that a portion of the Rarus location was patented under the Johnstown claim, the defendants contend and claim that only the surface ground of the Johnstown claim was patented to the patentees therein named and that all veins lying within the original location lines of the Rarus claim were patented to the claimant under the Rarus claim and that defendants are entitled to claim the said veins ex-
11 tending through the Johnstown patent under and by virtue

of the Rarus patent and that its extralateral rights should be determined by the Rarus and not by the Johnstown patent.

Plaintiff further shows that it disputes each and every one of the claims made by the defendants relative to the construction of said several patents and claims that all veins whose apexes lie within the Johnstown patent must be governed and regulated in extralateral rights, if any they have under the Johnstown patent and not under and by virtue of the Rarus patent.

And plaintiff further shows that the defendants claim that if they have no right to follow the veins within the lines of the original Rarus location, by virtue of the said Rarus patent, that they have a right to follow the same under and by virtue of the Johnstown patent, or the Johnstown and Rarus patents combined, under and beneath that portion of the Pennsylvania Lode claim belonging to this plaintiff; but opposed to this contention the plaintiff contends and insists that the defendants have no right to follow any vein having its apex either within the Johnstown or Rarus patents, under any circumstances, into or under the Pennsylvania Lode claim, at any point east of the intersection of the south side line of the Johnstown patent with the south side line of the original Rarus location.

And plaintiff further shows that the said defendants contend and claim that the plaintiff cannot under any circumstances obtain any relief for ores extracted within that portion of the premises owned by it without first showing that the apexes of the veins from which the ores were extracted are within the surface lines of the ground owned and claimed by the plaintiff, whereas, plaintiff claims that *prima facie* it is the owner of all ores found within its boundaries extended downward into the earth until it has been shown that some other person or company has some right thereto by reason of ownership of the apex of the vein within some other claim.

12 And plaintiff further shows that it is claimed by the defendants that the apex of the veins from which the ores in question were extracted, is divided, in that portion thereof as claimed by the defendants as upon the Rarus Lode claim, and a portion thereof upon the Johnstown Lode claim and a portion thereof upon the Pennsylvania Lode claim.

And defendants claim that by reason of the said divided apex that they may claim the right to follow the said vein beneath the surface and without the lines of the Rarus and Johnstown claims, under and by virtue of either or both of the said claims, at their election.

Plaintiff alleges that if any such vein as is claimed by the defendants exists that they have no extralateral rights by reason of the fact that the same has a divided apex.

Wherefore, plaintiff shows that there is involved in the matters in controversy, between plaintiff and the said defendants, the numerous questions aforesaid, which involve the construction of the statutes of the United States, relative to locating, purchasing and patenting of mineral lands and the construction of such statutes relative to the right of one claimant to follow veins down to and

into the premises of another, under the circumstances and situation of the parties as hereinbefore set out, and also the construction of said statutes in relation to patenting of claims and whether the vein can be patented to one person and the surface to another and to the right of the Land Department to segregate the surface from the mineral in the ground, granting one to one person and the other to another, and as to whether said action is authorized under and by virtue of said statutes, and also as to whether when an apex of a vein is divided upon the surface, part being within the premises granted in one patent and part within another, as to what, if any, extralateral rights are granted under such circumstances to either party.

13 Wherefore, plaintiff prays judgment against the defendants for the sum of five hundred thousand dollars and for costs of suit.

JOHN F. FORBIS,
Attorneys for Plaintiff.

STATE OF MONTANA, }
County of Silver Bow, } ss.

John F. Forbis, being first duly sworn on oath says: That he is the attorney for the plaintiff in the above-entitled action; that all of the officers of said plaintiff corporation are absent from the State and district of Montana, hence this verification by affiant; that affiant has read the foregoing complaint and knows the contents thereof and that the facts and matters therein stated are true of his best knowledge, information and belief.

JOHN F. FORBIS.

Subscribed and sworn to before me this 29th day of March, 1898.

[Seal Circuit Court.]

CHARLES W. BLAIR,
Deputy Clerk, United States Circuit Court,
Ninth Circuit, District of Montana.

14 EX. "A."

THE UNITED STATES OF AMERICA.

General Land Office No., 9457; mineral certificate No. 993.

To all to whom these presents shall come, Greeting:

Whereas, in pursuance of the provisions of the Revised Statutes of the United States, chapter six, title thirty-two, there have been deposited in the General Land Office of the United States the plat and field-notes of survey of the claim of Stanislaus E. Hirbour, Joseph Ortyer, Eugene Fornier, Peter Tetrault, and the heirs of Michael Roy, deceased, upon the Rarus lode, accompanied by the certificate of the register of the land office at Helena, in the Territory of Montana, whereby it appears that, in pursuance of the said Revised Statutes of the United States, the said Stanislaus

E. Hirbour, Joseph Orytyer, Eugene Fournier, Peter Tetrault, and the heirs of Michael Roy, deceased, did on the twelfth day of May, A. D. 1883, enter and pay for said mining claim or premises, being mineral entry No. 993, in the series of said office, designated by the surveyor general as lot No. 179, embracing a portion of section eighteen (18) in township three (3) north of range seven (7) west of the principal meridian, in the Summit Valley mining district, in the county of Silver Bow and Territory of Montana, in the district of lands subject to sale at Helena, containing two and ninety-eight hundredths—$\frac{98}{100}$—acres of land, more or less and according to the returns on file in the General Land Office, bounded, described and platted as follows, with magnetic variations at twenty (20) degrees east, to wit: Beginning at corner number one, a granite stone 16 x 13 x 8 inches in size, marked "1, M. C. 79," from which corner number one of lot No. 113, patented to W. J. McNamara *et al.*, with their claim upon the Mountain View lode, bears south fifty-seven (57) degrees, fifty-seven (57) minutes west at the distance of one hundred and seventy (170) feet, and the quarter-section corner on north boundary of section eighteen (18) in township three (3) north of range seven (7) west, of the principal meridian, bears north eighty-five (85) degrees, eighteen (18) minutes forty (40) seconds west at the distance of seven hundred and eighty-four and one-tenth ($784\frac{1}{10}$th) feet; thence from said corner No. one south twenty-five (25) degrees, forty (40) minutes west, thirty-five (35) feet, to a granite stone 18 x 18 x 6 inches in size, marked "P. L. M. C. 126–179," situate on northerly boundary of lot No. 126, made for the Little Ida lode, seventy-two and five-tenths ($72\frac{5}{10}$ths) feet, to a granite stone 18 x 16 x 4 inches in size, marked "P. I. M. C. 173–179," situate on northerly boundary of lot No. 173, made for the claim of William Harris, Sr., *et al.*, upon the Johnstown lode, four hundred and twenty-two (422) feet to corner number 2, a granite stone 24 x 8 x 6 inches in size, with mound of stones, marked "2 M. C. 179," from which corner number one of said lot No. 126, the same being corner No. 2 of lot No. 64, patented to C. X. Larabie, with his claim upon St. Lawrence lode, bears north thirty-five (35) degrees, thirty-four (34) minutes west at the distance of two hundred and ninety (290) feet, and corner number one of said lot No. 173, bears north thirty-one (31) degrees, twenty-four (24) minutes west at the distance of three hundred and thirty-nine (339) feet; thence from said corner No. 2, south sixty-nine (69) degrees twenty-five (25) minutes east, two hundred and seventy-seven (277) feet to a granite stone 18 x 18 x 6 inches in size, marked "P. I. M. C. 126–179," situate on southerly boundary of said lot No. 126, from which corner number three of said lot No. 126 bears north seventy-two (72) degrees, fifty-two (52) minutes east at the distance of four hundred and eighty-two (482), seven hundred (700) feet, to a granite stone 22 x 8 x 6 inches in size, marked "P. I. M. C. 173–179," situate on southerly boundary of said lot No. 173, from which corner No. 3 of said lot No. 173, bears north eighty-five (85) degrees thirty (30) minutes east at the distance of five hundred and sixty-seven (567) feet, eight hundred and seventy-

one (871) feet, to a granite stone 18 x 7 x 4 inches in size, marked "P. I. M. C. 172–179," situate on northerly boundary of lot No. 172, made for the claim of William Harris, Sr., *et al.*, upon the Pennsylvania lode, from which corner number two of said lot No. 172, bears south eighty-eight (88) degrees, fifteen (15) minutes east, at the distance of one hundred and thirty (130) feet; number three shaft bears north fifteen (15) degrees west at the distance of
17 one hundred and ninety-one (191) feet, and number two shaft bears north twenty-two (22) degrees east at the distance of one hundred and thirty-two (132), ten hundred and seven (1007) feet, to a granite stone 20 x 12 x 4 inches in size, marked "P. I. M. C. 172–179," situate on easterly boundary of said lot No. 172, from which corner No. 2 of said lot No. 172 bears north four (4) degrees, thirty (30) minutes east at the distance of forty-four (44) feet, and discovery shaft bears north ten (10) degrees east, at the distance of one hundred and forty-three (143) feet, thirteen hundred and sixteen (1316) feet to corner number three, a granite stone 22 x 10 x 6 inches in size, marked "3 M. C. 179," from which corner No. 2 of said lot No. 172 bears north sixty-one (61) degrees, twenty (20) minutes west, at the distance of three hundred and twenty-one (321) feet; thence from said corner No. 3 north twenty-five (25) degrees, forty (40) minutes east, one hundred and twelve (112) feet, to a point from which the face of a tunnel bears north sixty-five (65) degrees west at the distance of eighty-seven (87) feet, four hundred and forty (440) feet, to corner number four, a granite stone 18 x 8 x 6 inches in size, marked "4 M. C. 179"; thence north seventy (70) degrees, nine (9) minutes, two hundred and forty-six (246) feet to a granite stone 20 x 8 x 5 inches in size, marked "P. I. M. C. 173–179," situate on easterly boundary of said lot No. 173, from which corner number three of said lot No. 173 bears south eight (8) degrees, thirty (30) minutes east, at the distance of two hundred and nineteen (219) feet,
18 seven hundred and sixty-eight (768) feet, to a granite stone 18 x 8 x 6 inches in size, marked "P. I. M. C. 126–179," situate on easterly boundary of said lot No. 126, from which corner number three of said lot No. 126 bears south eight (8) degrees, thirty (30) minutes, at the distance of one hundred and fifty (150) feet, eleven hundred and sixty-eight (1168) feet, to a granite stone 18 x 8 x 8 inches in size, marked "P. I. M. C. 173–179," situate on northerly boundary of said lot No. 173, from which the point of intersection of westerly boundary of this claim, with the northerly boundary of said lot No. 173, bears south eighty-five (85) degrees, thirty (30) minutes west, at the distance of one hundred and seventy-four (174) feet; twelve hundred and seventy-eight (1278) feet, to a granite stone 16 x 10 x 6 inches in size, marked "P. I. M. C. 126–179," situate on northerly boundary of said lot No. 126, from which the point of intersection of westerly boundary of this claim with the northerly boundary of said lot No. 126, bears south seventy-two (72) degrees west, at the distance of fifty-six (56) feet, thirteen hundred and eighteen (1318) feet, to the place of beginning, containing two and ninety-eight-hundredths (2_{100}^{98}ths) acres of land, more or less, and embracing thirteen hundred and eighteen (1318) linear feet of the

said Rarus lode, as represented by yellow shading in the following plat:

(Here follows map marked p. 19.)

20 Now know ye, that the United States of America, in consideration of the premises, and in conformity with said Revised Statutes of the United States, have given and granted, and by these presents do give and grant, unto the said Stainlas E. Hirbour, Joseph Ortyer, Eugene Fournier, Peter Tetrealt, and the heirs of Michael Roy, deceased, and to their heirs and assigns, the said mining premises hereinbefore described as lot No 179, embracing a portion of section eighteen (18) in township three (3) north of range seven (7) west of the principal meridian, with the exclusive right of possession and enjoyment of all the land included within the exterior lines of said survey not herein expressly excepted from these presents, and of thirteen hundred and eighteen (1318) linear feet of the said Rarus vein, lode, ledge, or deposit for the length hereinbefore described, throughout its entire depth, although it may enter the land adjoining, and also of all other veins, lodes, ledges or deposits throughout their entire depth, the tops or apexes of which lie inside the exterior lines of said survey at the surface extended downward vertically, although such veins, lodes, ledges, or deposits in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said survey; provided, that the right of possession hereby granted to such outside parts of said veins, lodes, ledges, or
21 deposits shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said survey at the surface, so continued in their own direction that such vertical planes will intersect such exterior parts of said veins, lodes, ledges, or deposits. Excepting and excluding, however, from these presents all that portion of the surface ground hereinbefore described, which is embraced by said lots Nos. 126, 172 and 173; and provided further, that nothing in this conveyance shall authorize the grantees herein, their heirs or assigns, to enter upon the surface of a mining claim owned or possessed by another. To have and to hold, the said mining premises, together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging unto the said Stainslas E. Hirbour, Joseph Ortyer, Eugene Fournier, Peter Tetrault, and the heirs of Michael Roy, deceased, and to their heirs and assigns forever, subject, nevertheless, to the following conditions and stipulations:

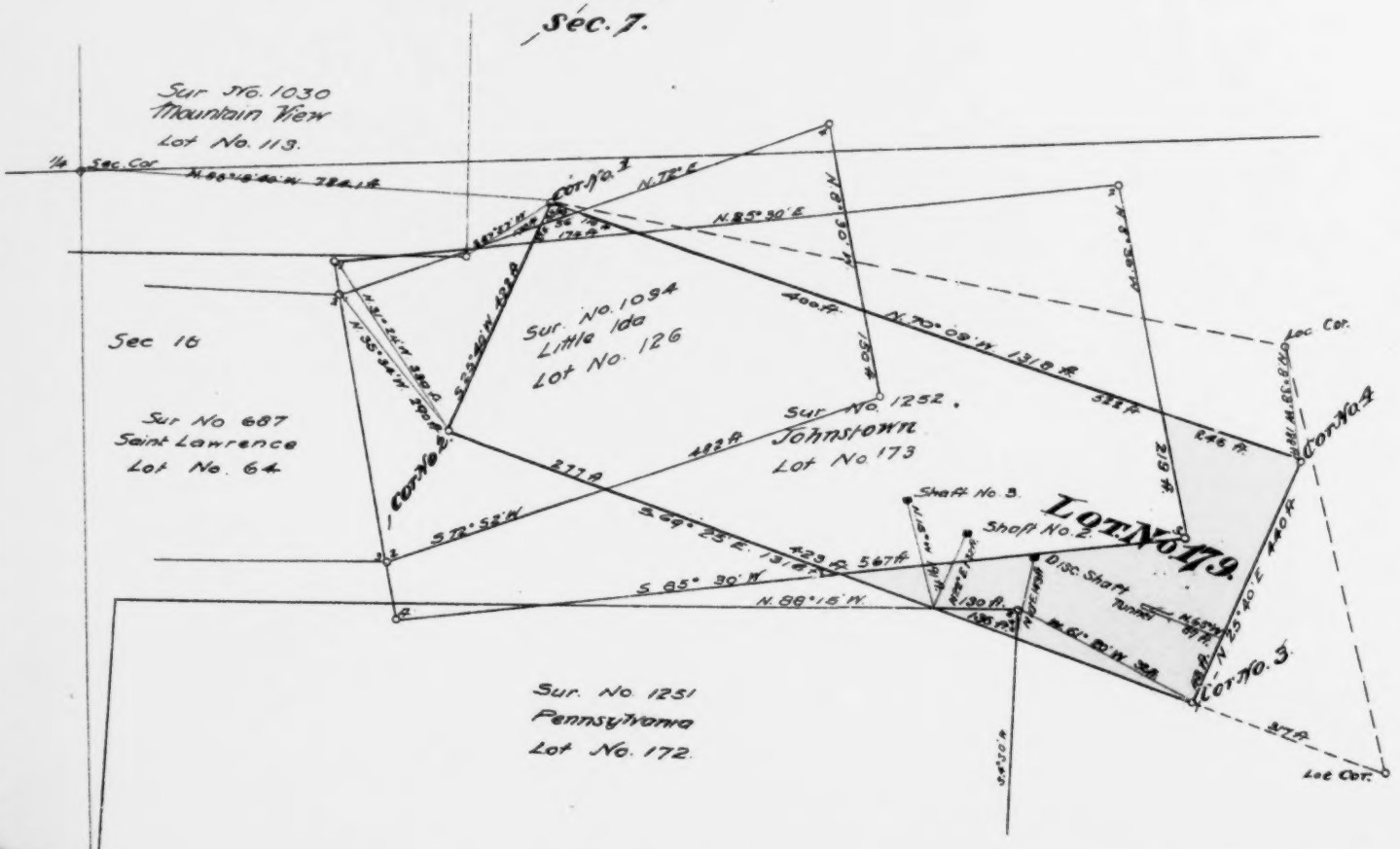
First. That the grant hereby made is restricted to the land hereinbefore described as lot No. 179, with thirteen hundred and eighteen (1318) linear feet of the Rarus vein, lode, ledge, or deposit for the length aforesaid throughout its entire depth as aforesaid, together with all other veins, lodes, ledges, or deposits throughout their entire depths, as aforesaid, the tops or apexes of which lie inside the exterior lines of said survey.

22 Second. That the premises hereby conveyed, with the exception of the surface, may be entered by the proprietor of any

Plat
of the Claim of
Stanislas E. Hirbour et. al.
UPON THE
Rarus Lode
Summit Valley Mining District, Silver Bow County
Montana.
Containing 2.98 Acres.
Scale 200 ft to an inch
Var 20° E.

No. 328
B B & M. C. Co's. M. Co } p. 19
M. O. P. Co's Cert.

T. 3 N. R 7 W.
Surveyed
Sec. 7.



other vein, lode, ledge or deposit, the top or apex of which lies outside the exterior limits of said survey, should the same in its downward course be found to penetrate, intersect, extend into, or underlie the premises hereby granted, for the purpose of extracting and removing the ore from such other vein, lode, ledge or deposit.

Third. That the premises hereby conveyed shall be held subject to any vested and approved water rights for mining, agriculture, manufacturing or other purpose, the rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local laws, customs and decisions of courts.

Fourth. That in the absence of necessary legislation by Congress, the legislature of Montana may provide rules for working the mining claims or premises hereby granted, involving easements, drainage and other necessary means to its complete development.

In testimony whereof, I, Chester A. Arthur, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, the
23 twenty-fifth day of June, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States one hundred and eighth.

By the President,

CHESTER A. ARTHUR,
By W. H. COOK, *Secretary.*

[General Land Office Seal.]

S. W. CLARK,
Recorder of the General Land Office.

"Examined."

Recorded, vol. 112, pages 345 to 348, inclusive.

Filed for record, February 23rd, A. D. 1895, at fifty minutes past nine o'clock a. m.

C. Q. JOHNSON,
County Recorder,
By A. E. WHIPPS, *Deputy.*

STATE OF MONTANA, }
County of Silver Bow, } ss :

I, John Weston, county clerk and recorder of said county, do hereby certify that the annexed instrument is a full, true and correct copy of the original instrument, as recorded at page 190 in Book C of U. S. Patents, Records of Silver Bow County, Montana.

Attest my hand and the seal of said Silver Bow county hereunto affixed this 18th day of May, 1897.

JOHN WESTON,
County Clerk and Recorder,
By J. E. MORAN, *Deputy.*

24 EX. "B."

THE UNITED STATES OF AMERICA.

General Land Office No., 9893; mineral certificate No. 1012.

To all to whom these presents shall come, Greeting:

Whereas, in pursuance of the provisions of the Revised Statutes of the United States, chapter six, title thirty-two, there has been deposited in the General Land Office of the United States, the plat and field-notes of survey of the claim of William Harris, Sr., William Harris, Jr., John E. Lloyd, Thomas E. Lloyd, Jeremiah Griffith, Thomas Griffith and John H. Davis, upon the Johnstown lode, accompanied by the certificate of the register of the land office at Helena, in the Territory of Montana, whereby it appears that, in pursuance of the said Revised Statutes of the United States, the said William Harris, Sr., William Harris, Jr., John E. Lloyd, David J. Lloyd, Thomas E. Lloyd, Jeremiah Griffith, Thomas Griffith and John H. Davis, did, on the first day of December, A. D. 1883, enter and pay for said mining claim or premises, being mineral entry number 1012 in the series of said office, designated by the surveyor general as lot No. 173, embracing a portion of section eighteen (18), in township three (3) north of range seven (7) west of the
25 principal meridian in the Summit Valley mining district, in the county of Silver Bow and Territory of Montana, in the district of land subject to sale at Helena, containing eighteen (18) acres of land, more or less, and according to the returns on file in the General Land Office, bounded, described and platted as follows, with magnetic variation- as hereinafter stated, to wit: Beginning at corner number one, a granite stone 19 x 10 x 6 inches in size, marked "I. M.C. 173," from which the quarter-section corner on north boundary of section eighteen (18) in township three (3) north of range seven (7) west of the principal meridian bears, with magnetic variation at twenty (20) degrees east, north sixty-nine (69) degrees, forty-nine (49) minutes, and twenty-seven (27) seconds west at the distance of four hundred and forty-nine and seven-tenths (449.7) feet, corner number two (2) of lot number one hundred and twenty-seven (127), the Smelter Lode claim bears north sixty-three (63) degrees east at the distance of two hundred and eighteen (218) feet, and corner number one of lot number one hundred and thirteen, the Mountain View Lode claim bears east at the distance of two hundred and twenty-three (223) feet; thence, from said corner number one, north eighty-five (85) degrees thirty (30) minutes east, seventy-three (73) feet to a granite stone eighteen by 8 by 6 inches in size, marked "P. I. M. C. 113–173," situate on southerly boundary of said lot No. 113, from which corner number one of said lot No. 113, bears south eighty-seven (87) degrees, thirty (30) minutes east at the distance of
26 one hundred and forty-five (145) feet and the point of intersection of the southerly boundary of said lot No. 113, to the northerly boundary of lot No. 126, the Little Ida Lode claim, bears

south eighty-seven (87) degrees, thirty (30) minutes east at the distance of one hundred (100) feet; two hundred and nineteen (219) feet to a granite stone 16 x 12 x 10 inches in size, marked "P. I. M. C. 113–126 and 173," situate on easterly boundary of said lot No. 113, and northerly boundary of said lot No. 126, from which corner number one of said lot No. 113, bears south two (2) degrees, thirty (30) minutes west at the distance of seventeen (17), eight hundred and fifty-seven (857) feet to a granite stone 16 x 6 x 5 inches in size, marked "P. I. M. C. 126–173," situate on the easterly boundary of said lot No. 126, from which corner number three of said lot No. 126, bears south eight (8) degrees thirty (30) minutes east at a distance of three hundred and sixteen (316) feet, thirteen hundred and seventeen (1317) feet to corner number 2 a granite stone 18 x 10 x 8 inches in size, marked "M. C. 173;" thence south eight (8) degrees thirty (30) minutes east six hundred (600) feet, to corner number three, a granite stone 26 x 12 x 6 inches in size, with mound of stones, marked "3 M. C. 173;" thence south eighty-five (85) degrees, thirty (30) minutes west, ten hundred and eighty-five (1085) feet to a granite stone 24 x 16 x 6 inches in size, marked "P. I. M. C. 172–173," situate on northerly boundary of lot No. 172, the Pennsylvania Lode claim, thirteen hundred and seventeen (1317) feet to corner number four a granite stone
27 30 x 12 x 10 inches in size with mound of stones, marked "4 M. C. 173," from which the face of a tunnel bears, with magnetic variation at nineteen (19) degrees, forty-five (45) minutes east, south six (6) degrees east at the distance of six hundred and thirty-nine (639) feet, and corner number one of said lot No. 172 bears north eighty-five (85) degrees, fifteen (15) minutes west at the distance of four hundred and sixty-one (461) —; thence from said corner number four, north eight (8) degrees, thirty (30) minutes west twenty-five (25) feet to a granite stone 18 x 8 x 6 inches in size, marked "P. I. M. C. 172–173," situate on northerly boundary of said lot No. 172, from which corner number one of said lot No. 172 bears north eighty-eight (88) degrees, fifteen (15) minutes west at the distance of four hundred and fifty-six (456) —, and the point of intersection of northerly boundary of said lot No. 172 with the southerly boundary of this claim, bears south eighty-eight (88) degrees, fifteen (15) minutes east at the distance of two hundred and thirty-five (235) feet; ninety-three (93) feet to corner number 3 of lot No. 64, the St. Lawrence Lode claim, and also corner number two, of said lot No. 126, from which corner No. 3 of said lot No. 126 bears north seventy-two (72) degrees, fifty-two (52) minutes east at the distance of eight hundred and sixty-five (865) feet, three hundred (300) feet to a point, from which discovery shaft bears north eighty-five (85) degrees, thirty (30) minutes east at the distance of two hundred and fifty (250) feet, five hundred and forty-six (546) feet to corner number two of said lot number 64, and also corner number
28 one of said lot No. 126, from which the point of intersection of the southerly boundary of said lot No. 113, with the northerly boundary of said lot No. 126, bears north seventy-two (72) degrees east at the distance of one hundred and seventy-four (174) feet,

and the point of intersection of the northerly boundary of said lot with the northerly boundary of this claim and easterly boundary of said lot No. 113, bears north seventy-two (72) — east at the distance of two hundred and twenty-two (222) feet; six hundred (600) feet to the place of beginning, containing eighteen (18) acres of land, more or less, and embracing thirteen hundred and seventeen (1317) linear feet of the said Johnstown lode, as represented by yellow shading in the following plat:

(Here follows map marked p. 29.)

30 Now know ye; that the United States of America, in consideration of the premises, and in conformity of the said Reivsed Statutes of the United States, have given and granted, and by these presents do give and grant unto the said William Harris, Sr., William Harris, Jr., John E. Lloyd, David J. Lloyd, Thomas E. Lloyd, Jeremiah Griffith, Thomas Griffith and John H. Davis, and to their heirs, and assigns, the said mining premises hereinbefore described as lot No. 173, embracing a portion of section eighteen (18) in township three (3) north of range seven (7) west of the principal meridian, with the exclusive right of possession and enjoyment of all the land included within the exterior lines of said survey not herein expressly excepted from these presents, and of thirteen hundred and seventeen (1317) linear feet of the said Johnstown vein, lode, ledge or deposit for the length hereinbefore described, throughout its entire depth, although it may enter the land adjoining, and also of all other veins, lodes, ledges or deposits throughout their entire depth, the tops or apexes of which lie inside the exterior lines of said survey at the surface extended downward vertically, although such veins, lodes, ledges or deposits in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said survey; provided that the right of possession hereby granted to such outside parts of said veins, lodes, ledges or de-
31 posits shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said survey at the surface, so continued in their own direction that such vertical planes will intersect such exterior parts of said veins, lodes, ledges or deposits; excepting and excluding, however, from these presents all that portion of the surface ground hereinbefore described, which is embraced by said lots Nos. 113 and 172. And provided further, that nothing in this conveyance shall authorize the grantees herein, their heirs or assigns, to enter upon the surface of a mining claim owned or possessed by another; to have and to hold said mining premises, together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging unto the said William Harrris, Sr., William Harris, Jr., John E. Lloyd, David J. Lloyd, Thomas E. Lloyd, Jeremiah Griffith, Thomas Griffith and John H. Davis, and to their heirs and assigns forever, subject nevertheless to the following conditions and stipulations:

First. That the grant hereby made is restricted to the land here-

Plat

of the Claim of William Harris, Sr. et al upon the

Johnstown Lode.

Summit Valley Mining District, Silver Bow County, Montana.

Containing 18.00 Acres

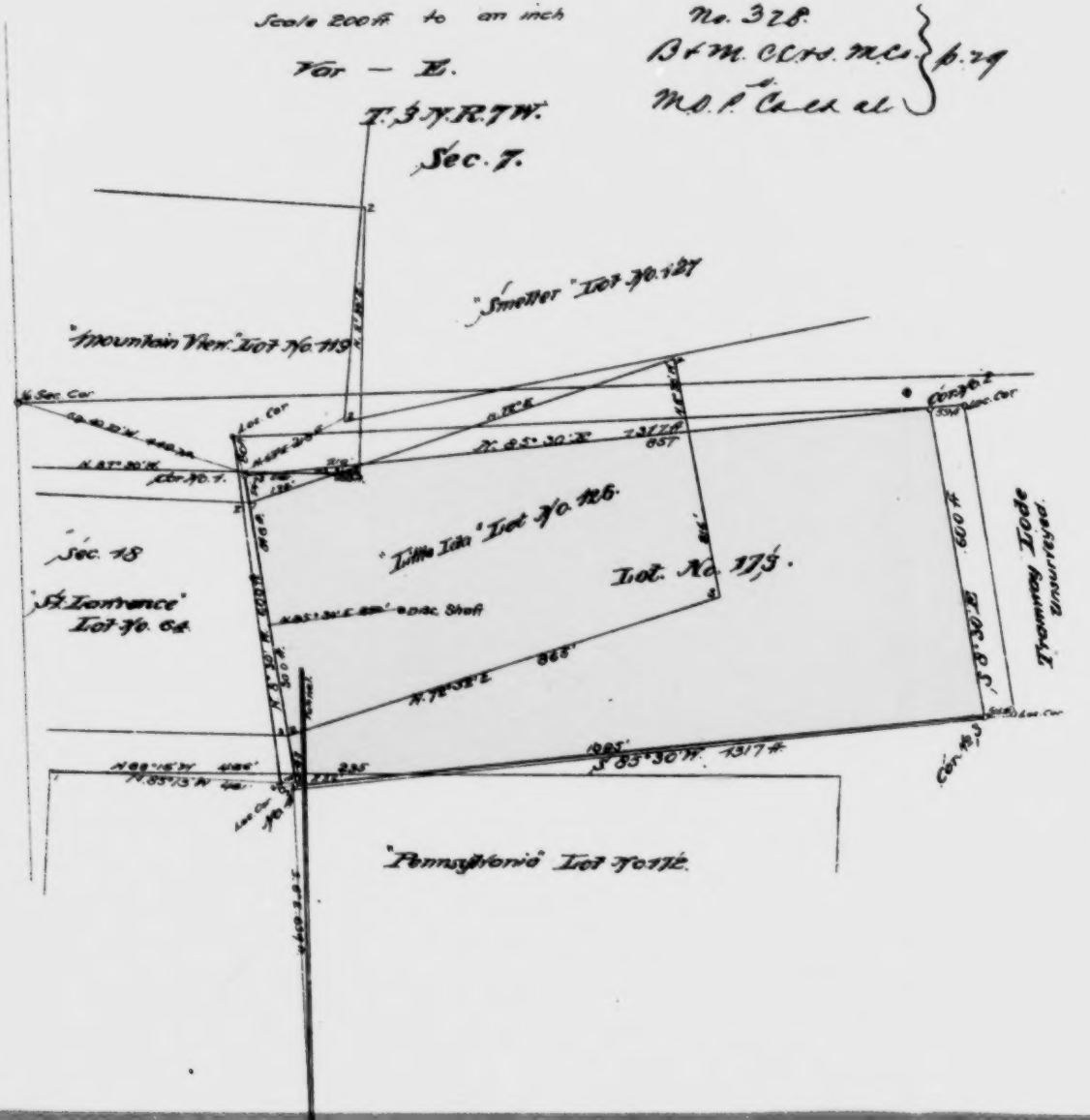
Scale 200 ft to an inch

No. 328.
B & M. Cons. M.C. } p. 29
M.O.P. Co. et al

For — E.

T. 3 N. R. 7 W.

Sec. 7.


"Smelter" Lot No. 127
"Mountain View" Lot No. 119
"Little Ida" Lot No. 126.
Lot. No. 173.
Sec. 18
"St. Lawrence" Lot No. 64
Thawville Lode
"Pennsylvania" Lot No. 116
N. 85° 30' E. 731.7 ft.
S. 85° 30' W. 1317 ft.
N. 85° 30' E. 868'
S. 85° 30' E. 600 ft.
N. 85° 30' E. 880'
N. 85° 30' E. 880'
N. 85° 30' E. 880'

inbefore described as lot No. 173 with thirteen hundred and seventeen (1317) linear feet of the Johnstown vein, lode, ledge or deposit for the length aforesaid, through its entire depth as aforesaid, together with all other veins, lodes, ledges or deposits, throughout their entire depths as aforesaid, the tops or apexes of which lie inside the exterior lines of said survey.

32 Second. That the premises thereby conveyed, with the exception of the surface, may be entered by the proprietor of any other vein, lode, ledge or deposit, the top or apex of which lies outside the exterior limits of said survey, should the same in its downward course be found to penetrate, intersect extend into or underlie the premises hereby granted, for the purpose of extracting and removing the ore from such other vein, lode, ledge or deposit.

Third. That the premises hereby conveyed shall be held subject to any vested and accrued water rights for mining, agriculture, manufacturing, or other purposes and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local laws, customs and decisions of courts.

Fourth. That in the absence of necessary legislation by Congress, the legislature of Montana may provide rules for working the mining claim or premises hereby granted, involving easement, drainage and other necessary means to its complete development.

In testimony whereof, I, Chester A. Arthur, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, the fif-

33 teenth day of November, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States the one hundred and ninth.

By the President,

CHESTER A. ARTHUR,
By M. McKEAN, *Secretary.*

[Seal of the General Land Office.]

S. W. CLARK,
Recorder of the General Land Office.

Recorded vol. 117, pages 329 to 333 inclusive. Examined. Filed for record March 12th, A. D. 1890, at five minutes past two o'clock p. m.

C. F. BOOTH,
County Recorder.

STATE OF MONTANA, }
County of Silver Bow, } ss:

I, John Weston, county clerk and recorder in and for said county and State, do hereby certify that the annexed instrument is a full, true, and correct copy of the original instrument as recorded at page 29 in Book B of U. S. Patents, records of Silver Bow county, Montana.

Attest my hand and the seal of said Silver Bow county hereunto affixed this 26th day of March, A. D. 1897.

JOHN WESTON,
County Clerk and Recorder,
By A. E. WHIPPS, *Deputy.*

34 Endorsed: (Title of court and cause.) Amended complaint. Filed March 29, 1898. Geo. W. Sproule, clerk by Charles W. Blair, deputy clerk.

And thereafter to wit on the 13th day of May, 1898, the defendants filed their demurrer to amended complaint which said demurrer is in the words and figures as follows to wit:

35 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING Company, a Corporation, Plaintiff,
vs.
MONTANA ORE PURCHASING COMPANY, a Corporation; F. Augustus Heinze, and Arthur P. Heinze, Defendants.

Demurrer to Amended Complaint.

Come now the above-named defendants and demur to the amended complaint of plaintiff on file herein, and for ground of demurrer state:

First. That the court has no jurisdiction of the subject-matter of this action.

Second. That it appears from the complaint that no Federal question is involved in the action, and that the controversy existing between the parties does not involve the construction of any statute or law of the United States.

Third. That the complaint does not state facts sufficient to constitute a cause of action.

Wherefore defendants pray that said action be dismissed, and that they have judgment for their costs.

JOHN J. McHATTON,
Attorney for the Defendants.

I hereby certify that in my opinion this demurrer is well founded in point of law.

JOHN J. McHATTON,
Attorney for the Defendants.

Service of the above demurrer acknowledged and copy received this 13th day of May, A. D. 1898.

FORBIS AND EVANS,
Attorneys for Plaintiff.

36 Demurrer to amended complaint. Filed May 13, 1898. Geo. W. Sproule, clerk, by Chas. W. Blair deputy clerk.

And thereafter to wit, on the 22nd day of March, 1899, the following proceedings were had in said cause as follows to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING Company, a Corporation, Plaintiff,
vs.
MONTANA ORE PURCHASING COMPANY, a Corporation; F. Augustus Heinze, and Arthur P. Heinze, Defendants.

In open court.

This cause heretofore submitted to the court on demurrer herein came on regularly for decision, and thereupon it is ordered that the demurrer herein be and the same hereby is sustained and cause dismissed for want of jurisdiction herein.

And thereafter to wit on the 30 day of March 1899, a bill of exceptions was duly signed allowed and filed herein which is in the words and figures as follows, to wit:

37 In the Circuit Court of the United States, Ninth Circuit, District of Montana, Southern Division.

BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING Company, a Corporation, Plaintiff,
vs.
MONTANA ORE PURCHASING COMPANY, a Corporation; F. Augustus Heinze, and Arthur P. Heinze, Defendants.

This cause came on for hearing upon the demurrer of defendants Montana Ore Purchasing Company, F. Augustus Heinze, and Arthur P. Heinze, to plaintiff's amended complaint herein on file, and upon the application of said defendants to dismiss said action and the said demurrer having been submitted to and duly considered by the court, the court rendered its decision herein sustaining said demurrer and dismissing said action upon the ground and for the reason that there was no Federal question presented by the allegations in said amended complaint and that therefore this court had no jurisdiction in said action.

And to the ruling of said court in sustaining said demurrer and dismissing said action, plaintiff in this action duly excepted and asks the court to sign and seal this its bill of exceptions, which is done accordingly in open court, this 29th day of March 1899.

HIRAM KNOWLES, *Judge.*

Bill of exceptions Filed March 30, 1899. Geo. W. Sproule, clerk by Chas. W. Blair, dep. clerk.

38 And thereafter to wit on the 30th day of March 1899, a certificate of question on writ of error was made and entered herein in the words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana, Southern Division.

BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER Mining Company, a Corporation, Plaintiff,
vs.
MONTANA ORE PURCHASING COMPANY, F. AUGUSTUS Heinze, and Arthur P. Heinze, Defendants. } No. 34.

Certificate of question of jurisdiction upon writ of error from the circuit court of the United States, ninth circuit, district of Montana, southern division, to the Supreme Court of the United States.

This cause coming on for hearing upon the demurrer of defendants, Montana Ore Purchasing Company, F. Augustus Heinze and Arthur P. Heinze, to plaintiff's amended complaint, on the ground of want of jurisdiction in this court to consider the same, and that there were no Federal questions presented by the allegations in said amended complaint, and upon the application of defendants, Montana Ore Purchasing Company, F. Augustus Heinze and Arthur P. Heinze, to dismiss said action upon the ground of want of jurisdiction in this court to consider the same, and that there was no Federal question presented by the allegations in said amended complaint, in said action, and the said demurrer and application having been submitted to and duly considered by this court, the said demurrer and application to dismiss was sustained for the reason and upon the ground that the court had no jurisdiction of said action, upon the facts stated in said amended complaint, and that there is no Federal question presented by the allegations in said complaint, and plaintiff being desirous of suing out a writ of error from the order and decree of this court in sustaining said demurrer and dismissing said action and having this day applied to this court for a certificate as required in such cases:

39

The court hereby certifies to the Supreme Court of the United States, for decision, the following question of jurisdiction, which has arisen upon said demurrer and application to dismiss, whether or not a Federal question is presented in the following allegations contained in plaintiff's amended complaint, which said allegations are as follows, to wit:

"That this plaintiff is now and at all the times hereinafter mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of Montana, with its principal place of business at Butte, Silver Bow county, in the State of Montana.

That the defendant, The Montana Ore Purchasing Company is now and at all times hereinafter mentioned was a corporation duly organized and existing under and by virtue of the laws of the State

of Montana, with its principal place of business at Butte city, in Silver Bow county, in the State of Montana.

That the defendants, F. Augustus Heinze and Arthur P. Heinze are officers of the said defendant, Montana Ore Purchasing Company, and in charge of its operations and affairs.

That at all the times hereinafter mentioned this plaintiff was and now is the owner of that portion of that certain quartz lode mining claim, situated in Summit Valley mining district, in Silver Bow county, in the State of Montana, and known as and called the Pennsylvania Lode claim, lot number 172, in township three
40 north range seven west, principal meridian for Montana, and which is particularly bounded and described as follows, to wit:

Beginning at corner number one, from which the quarter-section corner on north boundary of section eighteen, in township three, north range seven west of the principal meridian of Montana, bears north three degrees fifty-seven minutes west, seven hundred and thirteen (713) feet distant, and corner number three of lot number 64, the St. Lawrence Lode claim, and corner number 2 of lot number 126, the Little Ida Lode claim, bears north eighty-three degrees ten minutes east four hundred and forty-nine (449) feet distant. Thence first course magnetic variation, 19 degrees 45 minutes east south 88 degrees 15 minutes east, 56 feet to a point on east end line of lot 147, the Rob Roy Lode claim, for point of intersection of said lots 147 and 172, from which corner number 5 of said lot 147 bears south 11 degrees east two hundred and ninety-six (296) feet distant; one thousand five hundred (1500) feet to corner number two. Thence second course, magnetic variation, 20 degrees east south 4 degrees 30 minutes west 564.6 feet to a point on north boundary line of mineral application 722, a placer claim, from which the northwest corner of said mineral application 722, which is also the northeast corner of mineral application 686, a placer claim, bears west 183.9 feet distant, six hundred (600) feet to corner number three. Thence third course, magnetic variation, 20 degrees east north 88 degrees 15 minutes west 181.3 feet to a point on the west boundary line of said mineral application number 722, and east boundary line of said mineral application 686; from which the northwest corner of said mineral application 722 and the northeast corner of said mineral application 686 bears north 29.8 feet distant, nine hundred and twenty-four (924) feet to a point over a tunnel, from which the mouth of said tunnel bears south 58 feet distant, eleven hundred and fifty-six and two-tenths (1156.2) feet to a point on the north boundary line of said mineral application 686, from which the northeast corner of said mineral application 686 bears east
41 974.4 feet distant; fifteen hundred (1500) feet to corner number four, from which the southwest location corner bears south four degrees 30 minutes west, 48 feet distant, discovery shaft bears north 70 degrees 30 minutes east 827 feet distant, corner number five of said lot 147 bears north 27 degrees 30 minutes east 344 feet distant, and corner number three of lot 146, the Grant Ex-

tension lode, bears south 36 degrees 45 minutes west 152 feet distant thence fourth course, magnetic variation 20 degrees east north four degrees 30 minutes east 325 feet to a point on south side line of said lot 147, for point of intersection of said lots 147 and 172, from which corner number five of said lot number 147 bears south 82 degrees 4 minutes east 135 feet distant; six hundred feet to corner number one, the place of beginning. Expressly excepting and excluding herefrom all that portion of the ground heretofore described, embraced in said mining claim or lot number 147, also mineral applications number-686 and 722; and also that portion of said Pennsylvania vein or lode, and all veins, lodes or ledges throughout their entire depth, the tops or apexes of which lie inside of such excluded ground. Also excepting and excluding herefrom all that portion of the said above-described Pennsylvania Lode claim, described as follows, to wit: Beginning at the northeast corner of lot number 172, and running thence north 88 degrees 15 minutes west, 130 feet; thence south 69 degrees 25 minutes east 136 feet; thence north 4 degrees 30 minutes east 44 feet to the place of beginning and containing an area of $\frac{7}{100}$ of an acre of ground.

That heretofore, to wit: on or about the — day of —— 1895, the said defendants wrongfully and unlawfully entered upon and into the said premises hereinbefore described by underground workings and by tunnels, shafts, drifts, levels and cross-cuts and extracted therefrom large quantities of valuable ores, containing copper, silver and other precious metals, against the will, wish
42 and consent of this plaintiff.

That by means of said underground workings the said defendants have extracted from within the limits of this plaintiff's said premises hereinbefore described, one hundred and fifty thousand tons of ore, more or less, and of the reasonable value of five hundred thousand dollars ($500,000) and have converted the same to their own use and have smelted and reduced the said ores and taken the proceeds thereof and converted the same to their own use.

That by reason of said trespasses this plaintiff has been damaged in the sum of five hundred thousand dollars, and that the said defendants have not paid the same or any part thereof.

That plaintiff did not discover the fact constituting the said trespass and did not know thereof, until on or about the first day of December, 1896.

That the determination of the said controversy between the said plaintiff and the said defendants, involves the construction of title twenty-three, chapter VI of the Revised Statutes of the United States, concerning mines and mineral lands, in this to wit:

That the said Pennsylvania Lode claim, owned and claimed by the plaintiff as hereinbefore alleged, is a mining claim, duly located under the provisions of the statutes of the United States, relative to the appropriation of mineral lands and that the same has been patented as a mining claim under the provisions of said statutes.

That the said defendants own or claim to own a portion of that certain quartz lode mining claim, known as and called the Rarus Lode claim, lot number 179, and also a portion of that certain

quartz lode claim known as and called the Johnstown Lode claim, lot number 173, and also a portion of the Little Ida Lode mining claim, lot number 126, and which said claims lie north of and partially adjoining and near to the said Pennsylvania Lode
43 claim, on the north. That the plaintiff is not acquainted with the exact metes and bounds of the said ground owned or claimed by the defendants.

That the said Rarus Lode claim, Johnstown Lode claim and the Little Ida Lode claim are mineral claims located under the laws of the United States, relative to the appropriation and location of mineral lands, and plaintiff is informed and believes and therefore alleges that the said claims or some of them have been patented by the United States to various parties, and that such patents were issued under and by virtue of the statutes of the United States, relative to the patenting of mineral lands upon the public domain.

That as plaintiff is informed and believes and therefore alleges the said defendants claim the right to enter upon the premises of this plaintiff, to wit: that portion of the Pennsylvania Lode claim, above described, by reason of the fact that certain veins owned or claimed by the defendants or in their possession have their tops or apexes within the ground owned or claimed as a part of the Rarus Lode claim, a portion of the Johnstown Lode claim or a portion of the Little Ida Lode claim, and that defendants assert the right to follow such veins on their downward course or dips, although the same so far depart from a perpendicular as to depart from the ground owned or claimed by the defendants and enter the premises owned or claimed by this plaintiff, to wit, that portion of the Pennsylvania Lode claim hereinbefore described.

But plaintiff denies and disputes the fact that the said veins upon which the said defendants have mined within the lines of the Pennsylvania Lode claim, even if such veins have their apices in defendants' ground, which plaintiff does not admit, are such veins as can be followed, on their dip beyond the lines of the defendants' possessions and into the ground or premises of this plaintiff; but
44 alleges the facts to be that the said veins are broken and intersected by faults in such a manner that the same cannot be traced or followed from the ground of the defendants into the Pennsylvania Lode claim, and that therefore the said defendants have no right to enter upon the ground of this plaintiff, to wit: the said Pennsylvania Lode claim, for the purpose of extracting ores therefrom by reason of their ownership of the apices of any veins within their ground.

And this plaintiff further shows that the veins upon which the defendants have been extracting ore within the premises of this plaintiff, if they or any of them have their apices on defendants' ground, which plaintiff does not admit, do not in their course or strike depart from the end lines of the defendants' claims or possessions, but that the same depart from the side lines of such claims in such a manner as to prohibit the said defendants from

following the same beyond the said lines of their own possessions or claims, into plaintiff's portion of the said Pennsylvania claim.

That there are several veins which the defendants claim the right to follow on their dip beyond the side lines into the ground of this plaintiff, the Pennsylvania Lode claim, but that neither of the said veins in their course or strike depart from the end lines of the said claim- or possessions of the defendants, if they have their apices within defendants' premises at all, but plaintiff alleges that the ground claimed by the defendant was not so located or situated as to have any end lines whatever, as provided by the statutes of the United States in such cases and that in pursuance of such failure upon the part of the locator or locators of the ground or claims, owned or claimed by the defendants to mark the same with end lines parallel, or to locate the same along the veins, but on the contrary having located the same across the veins, the said defendants have no extralateral rights in or to any of the veins in their said ground, and are not entitled to follow the same into or upon
45 the ground of this plaintiff, the said portion of the Pennsylvania Lode claim.

And plaintiff further shows that a patent was issued by the United States to Stanislas E. Hirbour and others to that certain quartz lode claim, known as and called the Rarus Lode claim, hereinbefore referred to, a copy of which patent is hereto attached, marked Exhibit A and made a part of this complaint.

And plaintiff further shows that a patent has been granted by the United States to William Harris, Sr., and others for that certain quartz lode claim, known as and called the Johnstown Lode claim, a copy of which patent is hereto attached, marked Exhibit B and made a part of this complaint.

And as showing that the questions involved in this controversy are questions arising under the statutes of the United States, and involving the construction thereof, plaintiff shows and alleges that the said defendants herein claim to own a portion of the ground patented under both the said Johnstown and Rarus patents, and that by virtue of the said Rarus patent, they, the said defendants, have acquired 1318 linear feet of what is designated and called the Rarus lode, and it is contended by the said defendants that under and by virtue of the said Rarus patent they and their predecessors in interest were granted 1318 linear feet to the Rarus lode, extending from what is known as the east end line of the Rarus claim, to an imaginary or projected line of the Rarus location.

And plaintiff further shows that the surface ground patented to the predecessors in interest of defendants, to the Rarus Lode claim, does not include to exceed more than about three hundred feet of the said Rarus lode, as shown in yellow shading on the map, attached to the Rarus patent, but that notwithstanding the fact, that the surface ground granted by the said Rarus patent did not cover or extend over the said Rarus lode, the defendants contend
46 and claim that the said patent of the Rarus claim was granted to them and their predecessors in interest the said Rarus lode beyond the surface ground, granted by the Rarus patent and

to the full extent of 1318 linear feet, and also contend and claim that by reason of the ownership of the said lode for the length aforesaid, and that by reason of the fact that the same passes through the east end line of the Rarus claim, as patented, and the west end line of the original location of the said claim, that they are entitled to follow said veins on their course or dip into the earth and without the lines of the Rarus claim, both as originally located and as patented.

Plaintiff further shows that a large quantity of the ground which it is claimed by the defendant was originally included within the location of the Rarus claim has been patented under the said Johnstown patent, hereinbefore referred to and as shown by the portion shaded in yellow on the plat attached to the said Johnstown patent. That notwithstanding that a portion of the Rarus location was patented under the Johnstown claim, the defendants contend and claim that only the surface ground of the Johnstown claim was patented to the patentees therein named, and that all veins lying within the original location lines of the Rarus claim were patented to the claimant under the Rarus claim and that defendants are entitled to claim the said veins extending through the Johnstown patent under and by virtue of the Rarus patent, and that its extralateral rights should be determined by the Rarus and not by the Johnstown patent.

Plaintiff further shows that it disputes each and every one of the claims made by the defendants, relative to the construction of said several patents and claims that all veins whose apexes lie within the Johnstown patent must be governed and regulated in extralateral rights, if any they have, under the Johnstown patent and not under and by virtue of the Rarus patent.

47 And plaintiff further shows that the defendants claim that if they have no right to follow the veins within the lines of the original Rarus location, by virtue of the said Rarus patent, that they have a right to follow the same under and by virtue of the Johnstown patent or the Johnstown and Rarus patents combined, under and beneath that portion of the Pennsylvania Lode claim, belonging to this plaintiff; but opposed to this contention the plaintiff contends and insists that the defendants have no right to follow any vein having its apex either within the Johnstown or Rarus patents, under any circumstances into or under the Pennsylvania Lode claim. at any point east of the intersection of the south side line of the Johnstown patent with the south side line of the original Rarus location.

And plaintiff further shows that the said defendants contend and claim that the plaintiff cannot under any circumstances obtain any relief for ores extracted within that portion of the premises owned by it without first showing that the apexes of the veins from which the ores were extracted, are within the surface lines of the ground owned and claimed by the plaintiff, whereas, plaintiff claims that *prima facie* it is the owner of all ores found within its boundaries extended downward into the earth until it has been shown that some other person or company has some right thereto by reason of ownership of the apex of the vein within some other claim.

And plaintiff further shows that it is claimed by the defendants that the apex of the veins from which the ores in question were extracted, is divided, in that a portion thereof is claimed by the defendants as upon the Rarus Lode claim, and a portion thereof upon the Johnstown Lode claim, and a portion thereof upon the Pennsylvania Lode claim.

And defendants claim that by reason of the said divided apex that they may claim the right to follow the said vein beneath
48 the surface and without the lines of the Rarus and Johnstown claims, under and by virtue of either or both of the said claims at their election.

Plaintiff further alleges that if any such vein as is claimed by the defendants exists that they have no extralateral rights by reason of the fact that the same has a divided apex.

Wherefore plaintiff shows that there *is* involved in the matters in controversy, between the plaintiff and the said defendants the numerous questions aforesaid, which involve the construction of the statutes of the United States relative to locating, purchasing and patenting mineral lands, and the construction of such statutes relative to the right of one claimant to follow veins down to and into the premises of another, under the circumstances and situation of the parties as hereinbefore set out, and also the construction of such statutes in relation to patenting of claims, and whether the vein can be patented to one person and the surface to another, and to the right of the Land Department to segregate the surface from the mineral in the ground, granting one to one person and the other to another, and as to whether said action is authorized under and by virtue of said statutes, and also as to whether when an apex of a vein is divided upon the surface, part being within the premises granted in one patent, and a part within another, as to what, if any, extralateral rights are granted under such circumstances to either party.

Wherefore, plaintiff prays judgment against the defendants for the sum of five hundred thousand dollars and for costs of suit."

The court further certifies that upon the said amended complaint this court sustained said demurrer and entered its decree dismissing said action, holding that a Federal question was not pre-
49 sented by said allegations and that in consequence thereof there was no jurisdiction in this court in said action.

The court further certifies that the amount involved in said controversy, as shown by said amended complaint, is in excess of two thousand dollars, exclusive of interest and costs.

Done this 30 day of March, 1899.

HIRAM KNOWLES,
Judge of said Court.

Filed March 30, 1899.

GEO. W. SPROULE, *Clerk*,
By CHARLES W. BLAIR, *Dep. Clerk.*

And thereafter to wit, on the 16th day of March 1901, complainant filed its petition for a writ of error herein which is in the words and figures as follows, to wit,

50 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING Company, Complainant,
vs.
MONTANA ORE PURCHASING COMPANY, F. AUGUSTUS HEINZE, and Arthur P. Heinze, Defendants.

The Boston and Montana Consolidated Copper and Silver Mining Company, the plaintiff in the above-entitled cause, feeling itself aggrieved, by the order of the court, entered in the above-entitled cause on the 22nd day of March 1901, in sustaining the demurrer of the defendants to plaintiff's amended complaint, filed in said cause, and the order dismissing the said cause for the reason that the court had no jurisdiction over the parties or subject-matter set forth in the plaintiff's complaint, as will more fully appear by the certificate of jurisdiction filed in said cause, comes now by Forbis and Evans, its attorneys, and petitions the said court for an order allowing the said plaintiff to prosecute a writ of error to the honorable, the Supreme Court of the United States under and according to the laws of the United States in that behalf made and provided and also asks that an order be made fixing and allowing the amount of security which the plaintiff shall give and furnish upon the said writ of error. And your petitioner will ever pray.

FORBIS AND EVANS,
Attorneys for Plaintiff.

Service of the foregoing by copy is hereby acknowledged this 15th day of March 1901.

McHATTON AND COTTER,
Attorneys for Defendants.

51 Petition for writ of error. Filed and entered Mar. 16, 1901. Geo. W. Sproule, clerk.

And on said 16th day of March 1901 an order was duly made and entered allowing writ of error herein which is in the words and figures as follows, to wit:

52 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING Company, Plaintiff,
vs.
MONTANA ORE PURCHASING COMPANY, F. AUGUSTUS HEINZE, and Arthur P. Heinze, Defendants.

At the said term to wit: the February term A. D. 1901, of the circuit court of the United States of America, for the ninth circuit in and for the State and district of Montana, held at the court-room in the city of Butte, State of Montana, on the 16th day of March 1901:

Present: Hon. Hiram Knowles, district judge.

Upon the motion of Forbis and Evans, attorneys for the plaintiff, and upon the filing of the petition for a writ of error and assignment of errors:

It is ordered that a writ of error be and is hereby allowed to have reviewed in the Supreme Court of the United States the judgment heretofore entered herein dismissing the plaintiff's complaint and that the amount of bond on said writ of error be and is hereby fixed at five hundred dollars.

HIRAM KNOWLES, *Judge.*

Order allowing writ of error. Filed and entered Mar. 16 1901, Geo. W. Sproule, clerk.

And on said 16th day of March 1901 the complainant filed its assignment of errors herein which is in the words and figures as follows, to wit:

53 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING Company, Complainant,
vs.
MONTANA ORE PURCHASING COMPANY, F. AUGUSTUS HEINZE, and Arthur P. Heinze, Defendants.

Now comes the plaintiff in the above-entitled action and as-igns errors in the decision and judgment of the circuit court in said cause, as follows:

I.

The circuit court erred in sustaining the defendants' demurrer to the amended complaint of plaintiff herein.

II.

The circuit court erred in holding that the court had no jurisdiction of the subject-matter or parties in said action and in dismissing

the plaintiff's amended complaint and entering judgment for the defendants.

Wherefore the said plaintiff in error prays that the judgment of the said court be reversed and such directions be given that full force and efficiency may inure to the plaintiff by reason of its said cause of action, and that said cause of action may be prosecuted in the said circuit court.

FORBIS AND EVANS,
Attorneys for Plaintiff.

Service of the foregoing by copy is hereby acknowledged this 15th day of March 1901.

McHATTON AND COTTER,
Attorneys for Defendants.

Assignment of errors Filed and entered March 16–1901, Geo. W. Sproule, clerk.

54 And thereafter to wit, on the 16th day of March 1901, the complainant filed its bond on writ of error herein which is in the words and figures as follows, to wit:

55 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER Mining Company, Complainant,
vs
MONTANA ORE PURCHASING COMPANY, F. AUGUSTUS Heinze, and Arthur P. Heinze, Defendants.
} No. 34.

Bond.

Know all men by these presents: that the Boston and Montana Consolidated Copper and Silver Mining Company as principal, and Alex Johnston and J. K. Heclet as sureties are held and firmly bound unto the Montana Ore Purchasing Company, F. Augustus Heinze and Arthur P. Heinze, the defendants named above, in the sum of five hundred dollars, to be paid to the said Montana Ore Purchasing Company, F. Augustus Heinze and Arthur P. Heinze, their successors, executors or administrators to which payment well and truly to be made we bind ourselves and each of us jointly and severally, and our and each of our executors, representatives and assigns firmly by these presents.

Sealed with our seals and dated this 15th day of March 1901.

Whereas, the above-named plaintiff, Boston and Montana Consolidated Copper and Silver Mining Company has sued out a writ of error to the Supreme Court of the United States to reverse the judgment in the above-entitled cause entered by the circuit court of the United States for the district of Montana.

Now therefore, the condition of this obligation is such that if the

above-named Boston and Montana Consolidated Copper and
56 Silver Mining Company shall prosecute said writ of error to effect and answer all costs and damages, if it shall fail to make good its plea, then this obligation shall be void otherwise to remain in full force and effect.

ALEX J. JOHNSTON.
J. K. HESLET.

UNITED STATES OF AMERICA, }
State of Montana, County of Silver Bow, } *ss:*

Alex J. Joh-ston and J. K. Heslet sureties on the foregoing bond, being duly sworn, says, on oath, each for himself that he is a resident of the State of Montana, and a householder and worth the sum of five hundred dollars, over and above all his debts and liabilities and property exempt from execution in the State of Montana.

ALEX J. JOHNSTON.
J. K. HESLET.

Subscribed and sworn to before me this 15th day of March, 1901.

L. ORVIS EVANS,
Notary Public in and for the County of
[SEAL.] *Silver Bow, State of Montana.*

Sufficiency of sureties of foregoing obligation approved this 16 day of March 1901.

HIRAM KNOWLES, *Judge.*

Bond on appeal. Filed and entered Mar. 16, 1901. Geo. W. Sproule, clerk.

And thereafter to wit, on the 16th day of March 1901 a writ of error was duly issued herein which is hereto annexed.

57 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judge of the circuit court of the United States for the district of Montana, ninth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said circuit court before you between The Boston and Montana Consolidated Copper and Silver Mining Company, a corporation, plaintiff in said cause and plaintiff in error, and The Montana Ore Purchasing Company, F. Augustus Heinze and Arthur P. Heinze, defendants in said cause and defendants in error, a manifest error hath happened, to the great damage of the Boston and Montana Consolidated Copper and Silver Mining Company, plaintiff in error, as is said and appears by the petition herein. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done the parties aforesaid, in this behalf, do command, if judg-

ment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, on the 15th day of May, 1901, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid, being inspected, the said Supreme Court of the United States, may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 16 day of March, 1901.

{Seal United States Circuit Court, District of Montana, Southern Division, 1892.}

GEO. W. SPROULE,
Clerk of the United States Circuit Court, Ninth Circuit, District of Montana.

Allowed by
HIRAM KNOWLES,
District Judge.

Service of this writ of error and receipt of a copy thereof is hereby admitted this 16th day of March, 1901.

JOHN J. McHATTON,
JOHN W. COTTER,
Attorneys for Defendants in Error.

58 [Endorsed:] 34. In U. S. court. B. & M. Con. C. & S. M. Co. *v.* Montana Ore P. Co. *et al.* Writ of error. Filed and entered Mar. 18 1901 Geo. W. Sproule, clerk, by T. B. Stephens, deputy clerk.

The Answer of the Judges of the Circuit Court of the United States, Ninth Circuit, District of Montana.

The record and all proceedings of the *plaintiff* wherein mention is within made with all things touching the same we certify under the seal of our said court to the Supreme Court of the United States within mentioned, at the day and place within contained in a certain schedule to this writ annexed as within we are commanded.

By the court:

[Seal United States Circuit Court, District of Montana, 1890.]

GEO. W. SPROULE, *Clerk.*

59 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Montana Ore Purchasing Company, F. Augustus Heinze, and Arthur P. Heinze, and their attorneys, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, within sixty days from the date of this writ, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States, for the district of Montana, ninth circuit, wherein The Boston and Montana Consolidated Copper and Silver Mining Company, is plaintiff, and you are the defendants in error, to show cause, if any there be, why the judgment in said writ of error, mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Hiram Knowles, judge of the district court of the United States of America, for the district of Montana, this 16th day of March, A. D. 1901, and of the Independence of the United States the one hundred and twenty-fifth.

HIRAM KNOWLES,
United States District Judge, Presiding in the Circuit Court.

Attest:

{Seal United States Circuit Court, District of Montana, Southern Division, 1892.}

GEO. W. SPROULE, *Clerk.*

Service acknowledged and copy received this 16th day of March 1901.

JOHN J. McHATTON,
JOHN J. McHATTON,
Attorney for Defendants.

60 [Endorsed:] 34. In U. S. court. B. & M. Con. C. & S. M'g Co. *v.* M. O. P. Co. *et al.* Citation. Filed and entered Mar. 18 1901 Geo. W. Sproule, clerk. By T. B. Stephens, deputy clerk.

61 UNITED STATES OF AMERICA, *District of Montana,* } *ss:*

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

I, George W. Sproule, clerk of the United States circuit court for the district of Montana, do hereby certify and return to the honorable the Supreme Court of the United States, that the foregoing volume, consisting of 61 pages, numbered consecutively from 1 to 61 inclusive, is a true and correct transcript of the pleadings, certificate of question of jurisdiction orders, exhibits and other proceedings had in said cause and of the whole thereof, as appears

from the original records and files of said court in my possession; and I further certify and return that I have annexed to said transcript and included within said paging the original citation and writ of error.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Helena, in the district of Montana, this 6th day of May, in the year of our Lord one thousand nine hundred and one, and of the Independence of the United States the 125th.

[Seal United States Circuit Court, District of Montana, 1890.]

GEO. W. SPROULE, *Clerk.*

Endorsed on cover: File No. 18,174. Montana C. C. U. S. Term No. 328. The Boston and Montana Consolidated Copper and Silver Mining Company, plaintiff in error, *vs.* The Montana Ore Purchasing Company, F. Augustus Heinze, & Arthur P. Heinze. Filed May 21, 1901.

No. 922, 102
By. of Marshall for P. C.
Supreme Court, U.S.
FILED
APR 10 1902
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States,

OCTOBER TERM, 1901.

Filed April 10, 1902.

THE BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING COMPANY,
PLAINTIFF IN ERROR,

vs.

THE MONTANA ORE PURCHASING COMPANY, F. AUGUSTUS HEINZE and ARTHUR P. HEINZE,
DEFENDANTS IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

BRIEF FOR PLAINTIFF IN ERROR.

LOUIS MARSHALL,
JOHN F. FORBIS,
Appellant's Counsel.

APPEAL PRINTING CO., 14-16 VESEY STREET, N. Y.

13671

Supreme Court of the United States,

OCTOBER TERM, 1901.

THE BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING COMPANY, Plaintiff-in-Error, against THE MONTANA ORE PURCHASING COMPANY, F. Augustus Heinze and Arthur P. Heinze, Defendants-in-Error.	On Writ of Error to and Certificate from the Circuit Court of the United States, District of Montana. No. 328.

Brief for Plaintiff-in-Error.

This action was brought by the plaintiff in error against the defendants in error to recover Five hundred thousand dollars, damages sustained by the plaintiff-in-error by reason of the alleged wrongful taking by the defendants-in-error of ore alleged to belong to the plaintiff-in-error; the ore being extracted from beneath the surface of the Pennsylvania lode claim, the defendants-in-error claiming that the ore belonged to the Rarus lode

claim or that portion of the Johnstown lode claim which had been conveyed to them (Rec. pages 1-16).

The questions involved in this action are identical with those presented by the record in the case of the Boston and Montana Consolidated Copper and Silver Mining Company v. The Montana Ore Purchasing Company, F. Augustus Heinze and Arthur P. Heinze, October Term, 1901, No. 329, which is argued herewith.

The only difference between the two cases is that this is an action at law, while No. 329 is a suit in equity arising out of the same transactions, and that in the present case the defendants interposed no answer to the amended complaint, but demurred.

The demurrer appears at page 16 and is upon the grounds:

First. That the Court has no jurisdiction of the subject matter of this action.

Second. That it appears from the complaint that no federal question is involved in the action, and that the controversy existing between the parties does not involve the construction of any statute or law of the United States.

Third. That the complaint does not state facts sufficient to constitute a cause of action.

The demurrer was sustained, and the action was dismissed on the ground of want of jurisdiction (Rec., page 17).

Thereupon a certificate of the question of jurisdiction was made by Judge Knowles, by whom the case was decided, showing that the ground of his decision was that a federal question was not presented by the allegations of the amended com-

plaint, and that in consequence thereof there was no jurisdiction in the Circuit Court of the United States over this action (Rec., pages 18-24).

Error was duly assigned upon these rulings and a writ of error was duly allowed (Rec., page 26).

The discussion of the questions presented by the amended complaint and demurrer herein, involving the same considerations as have been fully presented in cause No. 329, a repetition of the argument is deemed unnecessary, but the Court is respectfully referred to the appellant's brief and argument in that case, so far as the same is applicable.

For the reasons there stated it is respectfully submitted that the judgment of the Circuit Court of the United States for the District of Montana, heretofore rendered herein, should be reversed and the action remanded to that Court with instructions to proceed therewith.

LOUIS MARSHALL,
JOHN F. FORBIS,
Counsel for Plaintiff-in-Error.

FILED
DEC 1 1902
JAMES H. McKENNEY,
Clerk.

No. 102

Supreme Court of the United States.

OCTOBER TERM, 1902.

Filed Dec. 1, 1902.

THE BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING COMPANY,
Plaintiff in Error,

vs.

THE MONTANA ORE PURCHASING COMPANY, F. AUGUSTUS HEINZE and ARTHUR P. HEINZE,
Defendants in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

BRIEF FOR PLAINTIFF IN ERROR ON MOTION TO DISMISS.

LOUIS MARSHALL,
JOHN F. FORBIS,
Appellant's Counsel.

C. G. Burroughs, Walker and Centre Streets, N. Y.

13674

Supreme Court of the United States,

OCTOBER TERM, 1902.

No. 102.

BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING COMPANY,
Plaintiff in Error,

AGAINST

MONTANA ORE PURCHASING COMPANY, F. AUGUSTUS HEINZE and ARTHUR P. HEINZE,
Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR ON MOTION TO DISMISS.

The defendant in error moves to dismiss, on the ground that no final judgment has ever been entered in this cause.

There is no basis for such a contention.

1. The record shows that a judgment was in fact entered in the action.

(a) On May 13th, 1898, a demurrer was interposed to the amended complaint herein on the ground that

the Circuit Court of the United States had no jurisdiction of the subject matter of the action, and that no federal question was involved therein (Rec., p. 16).

(b) On March 22d, 1899, it appears that judgment was entered in the following language (Rec., p. 17) :

" This cause heretofore submitted to the court on demurrer herein came on regularly for decision, and thereupon it is ordered that the demurrer herein be, and the same hereby is, sustained and cause dismissed for want of jurisdiction herein."

(c) The certificate on the question of jurisdiction after stating the dismissal of the action on the ground of want of jurisdiction, recites :

" * * * and the plaintiff being desirous of suing out of writ of error from the order and decree of this court in sustaining said demurrer and dismissing said action and having this day applied to this court for a certificate as required in such cases : The court hereby certifies," etc. (Rec., p. 18).

(d) The certificate further recites (Rec., p. 24) :

" The court further certifies that upon the said amended complaint this court sustained said demurrer *and entered its decree dismissing said action*, holding that a federal question was not presented by said allegations and that in consequence thereof there was no jurisdiction in this court in said action."

(e) The allowance of the appeal to this court is as follows (Rec., p. 26) :

" It is ordered that a writ of error be and is hereby allowed to have reviewed in the Supreme Court of the United States *the judgment heretofore entered herein dismissing the plaintiff's complaint, etc.*

(f) The assignment of errors refers to the judgment of the Circuit Court in this cause (Rec., pp. 26, 27).

(g) The bond on appeal likewise refers to the judgment (Rec., p. 27).

(h) The writ of error begins with the recital (Rec., p. 28) :

" Because in the record and proceedings, as also in the rendition of the *judgment* of a plea, which is in the said Circuit court," etc.

(i) The citation requires the defendants in error to show cause, if any there be, " *why the judgment in said writ of error mentioned should not be corrected*" (Rec., p. 30).

2. Furthermore, the instrument appearing on page 17 of the record, which the defendant in error denominates an order, is in reality a judgment, and is reviewable as such.

In *Fuller vs. Claflin (93 U. S., 14)* it was held that an order striking out an answer, since it ends the cause, leaves the action undefended, and confers a right to immediate judgment, is subject to review.

In *Ex parte Baltimore and Ohio R. R. Co. (108 U. S., 566)* it was held that where a Circuit Court on demurrer vacated and quashed a writ of replevin for want of jurisdiction, it was a final judgment, and if the case was otherwise within the court's jurisdiction, was subject to review on a writ of error.

In *Gumbel vs. Pitkin (113 U. S., 545)* it was held that an order dismissing the petition of a creditor who intervened in an action in which a writ of attachment had been issued and levied, is likewise reviewable by writ of error.

Nothing was required to be done to make the decision of the Court as evidenced by this document effective. It pronounced judgment in and of itself. It was not a mere authority to the clerk to enter judgment. It was pronounced in open court, and at once entered upon the records as the act of the Court. It

did not provide for the future entry of a judgment "in accordance with the order," as was the case in *Dale vs. Coppell (53 Mo., 321)*, cited by the defendant in error. It not only ordered that the demurrer be sustained, but it directed that the cause "be and the same *hereby* is" dismissed for want of jurisdiction herein.

To require a more formal judgment would involve needless repetition and add an unnecessary technicality to legal procedure, which is already sufficiently refined.

If the document under consideration is not in legal effect a judgment, then the plaintiff in error might at any time in the remote future sue out a writ of error when a more formal judgment has been entered. Such a result would not be in conformity with reason or justice.

All other questions discussed in the brief of the defendants in error in this case are sufficiently considered in the briefs filed by the appellant in Case No. 103.

LOUIS MARSHALL.
JOHN F. FORBIS,
Counsel for Plaintiff in Error.

No. 102.

FILED
NOV 17 1902
JAMES H. MCKENNEY,
Clerk.

SUPREME COURT

Brief of Cotter for D.C.

OF THE

UNITED STATES.

Filed Nov. 17, 1902.

OCTOBER TERM, 1902.

NO. 102.

THE BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING COMPANY,

Plaintiff in Error,

vs.

THE MONTANA ORE PURCHASING COMPANY, F. AUGUSTUS HEINZE, AND ARTHUR P. HEINZE,

Defendants in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, NINTH CIRCUIT, FOR THE DISTRICT OF MONTANA.

BRIEF FOR DEFENDANTS IN ERROR.

JOHN J. McHATTON,
JOHN W. COTTER,
Counsel for Defendants in Error.

BYRON S. ADAMS CO., PRINTERS, WASHINGTON, D. C.

The Supreme Court of the United States.

OCTOBER TERM, 1902.

NO. 102.

THE BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING COMPANY,

Plaintiff in Error,

vs.

THE MONTANA ORE PURCHASING COMPANY, F. AUGUSTUS HEINZE, AND ARTHUR P. HEINZE,

Defendants in Error.

ON WRIT OF ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, NINTH CIRCUIT, DISTRICT OF MONTANA.

BRIEF FOR DEFENDANTS IN ERROR.

ON MOTIONS TO DISMISS AND AFFIRM AND ON MERITS OF THE WRIT.

I.

ON MOTION TO DISMISS.

In support of the motion to dismiss the writ of error herein the defendants in error respectfully submit that a writ of error to the Circuit Court

can only issue to review a final judgment, and that there is no final judgment that has ever been entered in this case and none appears in the record. A writ of error has been sued out and in attempt to review the following order appearing on page 17 of the record:

"(TITLE OF COURT AND CAUSE.)

"IN OPEN COURT.

"This cause heretofore submitted to the Court on demurrer herein came on regularly for decision and thereupon it is ordered that the demurrer herein be, and the same hereby is sustained and the cause dismissed for want of jurisdiction herein."

The motion to dismiss is: First, the order is not a judgment and not reviewable, second, the record does not contain a judgment; third, there is no federal question involved.

The first two grounds of the motion to dismiss may be considered together. It is submitted that before any writ of error could be sued out and before this Court could entertain the same it was necessary that a judgment should be included in the record. The order is not the judgment, but merely the ruling of the Court, made in open court, and forming the basis for a judgment which might have thereafter been entered.

A judgment must be properly entered of record to support a writ of error.

Herrick vs. Cutcheon, 55 Fed. 6.

A record entry on a verdict as follows: "Whereupon the Court ordered judgment to be entered accordingly," was held insufficient.

Dale vs. Copple, 53 Mo. 321.

Where the judgment is required to be signed by the judge it cannot be reviewed by writ of error until it has been so signed.

Life Insurance Co. vs. Wilson, 8 Peters, 291.

An order sustaining a demurrer is not a final judgment.

Miners' Bank vs. United States, 5 How. 213.

We submit that the order appearing in the record is not a judgment.

Black on Judgments, Sec. 115, p. 125, N. 46;

Roberts vs. State, 3 Texas App. 47;

Faulk vs. Kellums, 54 Ill. 188.

Under former statutes allowing appeals within five years, an appeal might be perfected after the decision of the Court or the rendering of the decree.

Silsby vs. Foote, 20 How. 290.

But the statute has been changed and now the time begins to run from the actual entry of the decree or judgment.

Marks vs. N. P. R. Co., 76 Fed. 941;

Polleys vs. Improvement Co., 113 U. S. 81;

Winters vs. Ethell, 132 U. S. 207, at 210;

Yznaga Del Valle vs. Harrison, 93 U. S. 233;

Radford vs. Folsom, 131 U. S. 392.

Where a formal written judgment is not made and signed until the term succeeding the one at which the matter was orally determined, the judgment comes into existence only at the latter term and is under the control of the Court during said term.

Judson vs. Gage, 98 Fed. 540.

The difference between the decision of the Court or the rendering of the judgment and its entry, in so far as it affects the right to have it reviewed, is clearly established by the following cases, which hold that there can be no appeal until the judgment has been actually entered, and that an appeal taken before the actual entry of the judgment will be dismissed.

Onderdonk vs. San Francisco, 75 Cal. 534;

Coon vs. Grand Lodge, 76 Cal. 354.

The *third* ground of the motion to dismiss, because no federal question is involved or shown by the record, is well supported.

This is an action for trespass on a mining claim. The plaintiff alleges that it was at the time of the commencement of the suit and at all the times mentioned in the complaint, the owner of that portion of the Pennsylvania lode claim described in the

complaint; that the defendants entered into it and took away and converted to their own use certain ores of the value alleged, to the damage of the plaintiff in said amount, which were not paid to it. There is no allegation that it was in the *possession* or entitled to the possession of said portion of said claim. The want of allegation of *possession* in the plaintiff and the facts stated charging the defendants with taking ore show that the defendants were in possession.

Cosmos Exploration Co. vs. Gray Eagle Co., 112 Fed. 4;

U. S. Mining Co. vs. Lawson et al., 115 Fed. 1005.

Now whether the complaint, by reason of the absence of an allegation of possession, or right to possession, fails to give the Court jurisdiction, it is clear that in order for the plaintiff to state its cause of action it would only have been necessary for it to have alleged: First, its ownership; second, its possession; third, the entry and trespass of the defendants, and fourth, the injury sustained by the plaintiff thereby. This would have constituted, under the rules of good pleading, a statement of a cause of action in its favor. The allegations in the complaint seeking to show that the determination of a controversy would involve a federal question or the construction of some law of the United States are entirely irrelevant and imma-

terial they were and are, unnecessary to a statement of the plaintiff's cause of action; being so, they form no part of the complaint and do not enter into the cause of action whatever. To this complaint the defendants interposed a demurrer. (Record, p. 16.) The demurrer presents two points:

First, that the Court had no jurisdiction, and second, that the complaint did not state facts sufficient to constitute a cause of action.

The complaint is an amended one and was filed after the United States Circuit Court of Appeals had passed upon a like complaint in an equity action.

M. O. P. Co. vs. B. & M. Co. 85 Fed. 867.

It is evident that the defendants could have been in the possession of the premises described by the plaintiff, as its lessee or licensee, or under a claim of title thereto adverse to the plaintiff, and related back to the government title under which it may be surmised, although it is not alleged, and that the defendants were claiming a superior right to it over the plaintiff. It does not appear from the allegations setting forth plaintiff's alleged cause of action that the defendants were not in possession and claiming to own the premises described by plaintiff under and by virtue of a patent from the United States government therefor. No question of federal jurisdiction is, therefore, involved in

plaintiff's cause of action or presented in the statement thereon as contained in the complaint. The averments contained in the complaint and following the attempted statement of a cause of action by the plaintiff, are of no consequence and cannot be considered on the question of determining whether or not a federal question is involved or may become necessary for determination.

The complaint in its statement of a cause of action must disclose a federal question. The fact that a question might arise in the determination of the action, which would involve the construction of the constitution or some law of the United States is not sufficient.

For a further discussion of this matter and a reference to the authorities, we beg leave of the Court to permit us to follow the example of plaintiff in error and to submit the same upon the brief filed herein in Cause No. 103.

II.

ON THE MOTION TO AFFIRM AND ON THE MERITS.

What we have already said with reference to the plaintiff's complaint and the position of the case before the Circuit Court as presented thereon, and

on the defendants' demurrer, and in support of the second ground of the motion to dismiss, need not be repeated here; it has direct application to the motion to affirm and to a determination of the merits of the writ of error, if the Court shall not sustain the motion to dismiss on the ground that there is no final judgment in the record, and none shown to have been entered in the action from which a writ of error could be prosecuted.

We again beg to submit the case upon the argument and authorities presented in the brief filed in Cause No. 103. For the reasons here and there stated and upon the authorities cited we respectfully submit the case for a judgment of affirmance.

JOHN J. McHATTON,
JOHN W. COTTER,
Attorneys for Defendants in Error.

1368

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No 103.

THE BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING COMPANY, APPELLANT,

vs.

THE MONTANA ORE PURCHASING COMPANY, F. AUGUSTUS HEINZE, AND ARTHUR P. HEINZE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

FILED MAY 21, 1901.

(18,175.)

(18,175.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No 329.

THE BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING COMPANY, APPELLANT,

vs.

THE MONTANA ORE PURCHASING COMPANY, F. AUGUSTUS HEINZE, AND ARTHUR P. HEINZE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 19, 1901.

1 Pleas before the Honorable Hiram Knowles, judge of the district court of the United States for the district of Montana, sitting in the circuit court of the United States for the district of Montana, within the ninth judicial circuit, at the February term, 1901, thereof.

Be it remembered that on the 28th day of March, 1898 an "amended bill of complaint" was filed in the clerk's office of said circuit court; which said amended bill of complaint is in words and figures following to wit:

In the Circuit Court of the United States, Ninth Circuit, for the District of Montana, Southern Division. In Equity.

Boston and Montana Consolidated Copper & Silver Mining Company, a Corporation, Complainant,
vs.
Montana Ore Purchasing Company (a Corporation), F. Augustus Heinze, and Arthur P. Heinze, Defendants.

Amended Bill of Complaint.

To the honorable judges of the circuit court of the United States, ninth circuit, district of Montana:

The Boston and Montana Consolidated Copper and Silver Mining Company, a corporation organized and existing under the laws of the State of Montana, and a citizen of the State of Montana, leave of court being first had and obtained, files this its amended bill against the Montana Ore Purchasing Company, a corporation
2 organized under the laws of the State of Montana, and a citizen of the State of Montana, F. Augustus Heinze, of New York city, State of New York, and a citizen of the State of New York, and Arthur P. Heinze, of Brooklyn, in the State of New York, and a citizen of the State of New York. And thereupon your orator complains and says.

That your orator is now and at all the times hereinafter mentioned was a corporation organized and existing under and by virtue of the laws of the State — Montana, with its principal place of business at Butte city, in Silver Bow county, in the State of Montana.

That the defendant, Montana Ore Purchasing Company, is now and at the time hereinafter mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of Montana, with its principal place of business at Butte city, in Silver Bow county, in the State of Montana.

That your orator is the owner and entitled to the possession of that portion of the following-described property, known as and called the Pennsylvania Lode mining claim, lot number 172, situated in Summit Valley mining district, Silver Bow county, Montana, which is particularly bounded and described as follows, to wit:

Beginning at corner number one, from which the quarter section corner on north boundary of section eighteen in township
3 three, north of range seven west of the principal meridian for Montana bears north three degrees fifty-seven minutes west seven hundred and thirteen feet distant, and corner number three of lot number 64, St. Lawrence Lode claim, and corner number two of lot number 126, the Little Ida Lode claim, bears north eighty-three degrees ten minutes east four hundred and forty-nine feet distant; thence, first course, magnetic variation 19 degrees 45 minutes east south 88 degrees 15 minutes east 56 feet to a point on east end line of lot 147, the Rob Roy Lode claim; for point of intersection of said lots 147 and 172, from which corner number 5 of said lot 147 bears south 11 degrees east two hundred and ninety-six feet distant; one thousand five hundred feet to corner number two; thence, second course, magnetic variation 20 degrees east, south 4 degrees 30 minutes west 564.6 feet to a point on north boundary line of mineral application 722, a placer claim, from which the northwest corner of said mineral application 722, which is also the northeast corner of mineral application 686, a placer claim, bears west 183.9 feet distant; six hundred feet to corner number three; thence, third course, magnetic variation 20 degrees east, north 88 degrees 15 minutes west 181.3 feet to a point on the west boundary line of said mineral application 722, and east boundary line of said mineral application 686, from which the northwest corner of said mineral application 722 and the northeast corner of said mineral application 686 bears north 29.8 feet distant nine hundred and twenty-four feet to a point over a tunnel, from which the mouth
4 of said tunnel bears south 58 feet distant; eleven hundred and fifty-six and two-tenths feet to a point on the north boundary line of said mineral application 686, from which the northeast corner of said mineral application 686 bears east 974.4 feet distant; fifteen hundred feet to corner number four, from which the southwest location corner bears south four degrees 30 minutes west 48 feet distant; discovery shaft bears north 70 degrees 30 minutes east 827 feet distant; corner number five of said lot 147 bears north 27 degrees 30 minutes east 344 feet distant and corner number three of lot 146, the Grant Extension lode, bears south 36 degrees 45 minutes west 152 feet distant; thence, fourth course, magnetic variation 20 degrees east north 4 degrees 30 minutes east 325 feet to a point on south side line of said lot 147, for point of intersection of said lots 147 and 172, from which corner number five of said lot 147 bears south 82 degrees 4 minutes east 135 feet distant; six hundred feet to corner number one, the place of beginning. Expressly excepting and excluding herefrom all that portion of the ground here*to*before described, embraced in said mining claim or lot number 147; also mineral applications number 686 and 722; and also all that portion of said Pennsylvania lode; also all veins, lodes or ledges throughout their entire depth, the tops or apexes of which lie inside of such excluded ground. Also excepting and excluding herefrom all that portion of the said above-described Pennsylvania Lode claim described as follows, to wit: Beginning at

the northeast corner of lot number 172; and running thence
5 north 88 degrees 15 minutes west 130 feet; thence south 69 degrees 25 minutes east 136 feet; thence north 4 degrees 30 minutes east 44 feet to the place of beginning, and containing an area of $\frac{7}{100}$ of an acre of ground.

That this plaintiff became and was and is the owner of the said premises, in the following manner, to wit:

That on the 18th day of June, 1877, William Harris, Sr., and William Harris, Jr., duly located the said Pennsylvania Lode claim as a quartz lode mining claim.

That on the 13th day of January, 1879, the said William Harris, Sr., and William Harris, Jr., duly conveyed to John E. Lloyd, David J. Lloyd, and Thomas E. Lloyd, by regular deed of conveyance, a one-half undivided interest in and to the said Pennsylvania Lode claim.

That on the 13th day of January, 1879, William Harris, Sr., and William Harris, Jr., duly conveyed to John H. Davis, by regular deed of conveyance, an undivided one-sixth interest in and to the said Pennsylvania Lode claim.

That on the 19th day of May, 1879, the said John H. Davis duly conveyed to William Harris, Sr., by regular deed of conveyance, a one-twelfth undivided interest in and to the said Pennsylvania Lode claim.

That on May 19th, 1879, the said John H. Davis duly conveyed to John Dunstan, by regular deed of conveyance, a one-twelfth undivided interest in and to the said Pennsylvania Lode claim.

6 That on March 13, 1880, David J. Lloyd conveyed to Wm. W. Thomas, by regular deed of conveyance, an undivided one-twelfth interest in and to the said Pennsylvania Lode claim.

That on the 14th day of August, 1880, William Harris, Sr., and William Harris, Jr., conveyed to Thomas Griffith, by regular deed of conveyance, an undivided one-twelfth interest in and to the said Pennsylvania Lode claim.

That on July 6, 1882, Thomas C. Porter and Howell M. Thomas, the duly appointed, qualified and acting administrators of the estate of William W. Thomas, deceased, duly authorized and empowered, conveyed by regular deed of conveyance to John E. Lloyd an undivided one-twelfth interest in and to the said Pennsylvania Lode claim.

That on the 19th day of July, 1882, the said John E. Lloyd, by regular deed of conveyance, conveyed to Jeremiah Griffith an undivided one-twelfth interest in and to the said Pennsylvania Lode claim.

That on the 15th day of August, 1883, the said William E. Harris, Jr., and Anna Harris, his wife, by regular conveyance, conveyed to Thomas Griffith an undivided one-eighth interest in and to the said Pennsylvania Lode claim.

7 That on the 9th day of April, 1886, a United States patent for the said Pennsylvania Lode claim, was duly issued by the United States to William Harris, Sr., William Harris, Jr., John

E. Lloyd, David J. Lloyd, Thomas E. Lloyd, Jeremiah Griffith, Thomas Griffith, and John Dunstan.

That on the 28th day of March, 1888, the said Jeremiah Griffith, by regular deed of conveyance, conveyed to Enoch Grim an undivided one-twelfth interest in and to the said Pennsylvania Lode claim.

That on the 31st day of March, 1888, the said John E. Lloyd, Margaret Lloyd, his wife, Jeremiah Griffith, Enoch Grim, John H. Davis and Laura Davis, his wife, Thomas E. Lloyd, John Dunstan and Sarah Dunstan, his wife, William Harris, Sr., and Barbare Harris, his wife, William Harris, Jr., and Anna Harris, his wife, Thomas Griffith, and David J. Lloyd, by John E. Lloyd, his attorney-in-fact, by regular deed of conveyance, conveyed to Thomas Couch all that portion of the said Pennsylvania Lode claim, hereinbefore described as the property of this complainant, excepting a right of way to the Montana railway.

That on the 30th day of November, 1888, by regular deed of conveyance, the said Thomas Couch and Rachel Couch, his wife, conveyed to this complainant, the Boston and Montana Consolidated Copper and Silver Mining Company all that portion of the
8 said Pennsylvania Lode claim, hereinbefore described as the property of this complainant, and that thereby, and by virtue of the said conveyances, this complainant became and was and is the owner of the said premises hereinbefore described.

That on or about the 1st day of April, 1895, the said defendants wrongfully and unlawfully entered upon and into the said premises, hereinbefore described, by underground workings, and by tunnels, shafts, cross-cuts, and levels, and extracted from the said premises large quantities of valuable ores, to wit, one hundred and fifty thousand tons, more or less, and of the reasonable value of five hundred thousand dollars.

And that ever since the said date the said defendants have continued to extract and mine ores from the said premises belonging to this complainant, and are now mining and extracting ores therefrom, and threaten to continue to do so unless this court shall by its injunction restrain and enjoin the said defendants from so doing.

That the said ground of this complainant is valuable almost exclusively for the mineral therein contained, and that the same is very valuable for the copper and silver and gold ores which are found therein in large quantities, and that it is these ores that the defendants have extracted, and which they are now extracting and mining and threaten to continue to extract in the future.

9 That said ground owned by complainant, hereinbefore described, is of the reasonable value of more than one hundred thousand dollars, and that the said ores which the defendants are extracting, and threaten to extract are of a value in excess of fifty thousand dollars.

The complainant further alleges that it has no means of ascertaining the quantity or value of the ores which the said defendants are extracting or may extract from the said premises owned by this

complainant, and that if the defendants are permitted and allowed to continue to extract the said ores from the said premises that it would be altogether uncertain and indefinite as to what amount of ores, or the value thereof, which may be extracted in the future as in the past, and that this complainant will be compelled to rely to a great extent upon the good faith and showing of the defendants as to the amount and value of the ores which they have heretofore and may hereafter extract from the said premises.

That unless the defendants are enjoined and restrained from mining and extracting the ores from the said premises of this complainant, the said portion of the said Pennsylvania Lode claim, this complainant will be required to bring numerous actions for the determination of the damages which it has sustained and will sustain by reason of such trespasses, and that the said trespasses on the part of the said defendants are continuing from time to time, and
10 that this complainant brings this action in order to avoid a multiplicity of actions in the premises.

That by reason of the said trespasses on the part of the said defendants on the premises of this complainant, this complainant has suffered and will continue to suffer great and irreparable injury and damage.

That on or about the 6th day of March, 1897, this complainant brought an action in the circuit court of the United States, ninth circuit, for the district of Montana, southern division, against the said defendants, to recover of the said defendants for the ores extracted from the said portion of the Pennsylvania Lode claim, hereinbefore described, and that the said action is now pending in this court.

And, as showing the jurisdiction of this court to determine the said mattters set forth in the said action, this complainant alleges:

That the determination of the said controversy between the said complainant and the said defendants involves the construction of title twenty-three, chapter VI, of the Revised Statutes of the United States, concerning mines and mineral lands, in this, to wit:

That the said Pennsylvania Lode claim, owned and claimed by this complainant, as hereinbefore alleged, is a mining claim duly located under the provisions of the statutes of the United
11 States relative to the appropriation of mineral lands, and that the same has been patented as a mining claim under the provisions of the said statutes.

That the said defendants own or claim to own a portion of that certain quartz lode claim, known as and called the Rarus Lode claim, lott number 179; and also a portion of that certain other quartz lode mining claim, known as and called the Johnstown Lode claim, lott number 173; and also a portion of the Little Ida Lode mining claim, lot number 126; and which said claims lie north of and partially adjoining and near to the said Pennsylvania Lode claim on the north. The complainant is not acquainted with the exact mettes and bounds of the said ground owned or claimed by the defendants.

That the said Rarus Lode claim, Johnstown Lode claim, and

Little Ida Lode claim are mineral claims, located under the laws of the United States relative to the appropriation and location of mineral lands, and plaintiff is informed and believes, and therefore alleges that the said claims, or some of them, have been patented by the United States to various parties, and that such patents were issued under and by virtue of the statutes of the United States relative to the patenting of mineral lands upon the public domain.

12 That as plaintiff is informed and believes, and therefore alleges, the said defendants claimed the right to enter upon the premises of this complainant, to wit, that portion of the Pennsylvania Lode claim above described, by reason of the fact that certain veins, owned or claimed by the defendants or in their possession, have their tops or apexes within the ground owned or claimed as a portion of the Rarus Lode claim, a portion of the Johnstown Lode claim, or a portion of the Little Ida Lode claim, and defendants assert the right to follow such veins on their downward courses or dips, although the same so far depart from a perpendicular as to depart from the ground owned or claimed by the defendants, and enter the premises owned and claimed by this complainant, to wit, that portion of the Pennsylvania Lode claim hereinbefore described.

But complainant denies and disputes the fact that the said veins upon which the said defendants have mined within the lines of the Pennsylvania Lode claim, even if such veins have their apices in defendants' ground which complainant does not admit are such veins as can be followed on their dip beyond the lines of the defendants' possessions, and into the ground or premises of this plaintiff; but alleges the facts to be that the said veins are broken and intersected by faults in such a manner that the same cannot be traced or followed from the ground of the defendants into the said Pennsylvania Lode claim, and that therefore the said defendants have no right to enter upon the ground of this plaintiff, to wit, the said Pennsylvania Lode claim, for the purpose of extracting ores therefrom, by reason of their ownership of the apexes of any veins within their ground.

13 And this complainant further shows unto the court, that the veins, upon which the defendants have been extracting ores within the premises of this complainant, if they or any of them have their apices on defendants' ground which complainant does not admit do not in their course or strike depart from the end lines of the defendants' claims or possessions, but that the same depart from the side lines of such claims in such a manner as to prohibit the said defendants from following the same beyond the side lines of their own possessions or claims into plaintiff's portion of said Pennsylvania Lode claim.

That there are several veins which the defendants claim the right to follow on their dips beyond the side lines and into the ground of this complainant, the said Pennsylvania Lode claim, but that neither of the said veins in their courses or strikes depart from the end lines of the said claims or possessions of the defendants, if they have their apices within the defendants' premises at all but complainant alleges

that the ground claimed by the defendants was not so located or situated as to have any end lines whatever, as provided by the statutes of the United States in such cases, and that in consequence of such failure upon the part of the locator or locators of the ground or claims, owned or claimed by the defendants, to mark the same with end lines parallel, or to locate the same along the veins, but on the contrary having located the same across the veins, the said defendants have no extralateral rights in or to any of the veins in their said ground, and are not entitled to follow the same into or upon the ground of this plaintiff, the said portion of the Pennsylvania Lode claim.

14 And your orator further shows to your honors that a patent was issued by the United States to Stanislaus E. Birbour and others to that certain quartz lode claim known as and called the Rarus hereinbefore referred to, a copy of which patent is hereto attached, marked Exhibit "A" and made a part of this bill.

And your orator further shows that a patent has been granted by the United States to William Harris Sr. and others for that certain quartz claim, known as and called the Johnstown claim, a copy of which patent is hereto attached, marked Exhibit "B" and made a part of this bill.

And as showing to your honors that the questions involved in this controversy are questions arising under the statutes of the United States and involving the construction thereof, your orator shows and alleges that the said defendants herein claim to own a portion of the ground patented under both the said Johnstown and Rarus patents and that by virtue of the said Rarus patent, they, the said defendants, have acquired 1,318 linear feet of what is designated and called the Rarus lode and it is contended by the said defendants that under and by virtue of the said Rarus patent they and their predecessors in interest were granted 1,318 linear feet to the Rarus lode extending from what is known as the east end line of the Rarus claim to an imaginary or projected line of the Rarus location.

And your orator further shows to your honors that the surface ground patented to the predecessors in interest of defendant to the Rarus Lode claim do not include to exceed more than about three hundred feet of said Rarus lode and shown in yellow shading on the map attached to the Rarus patent, but that notwithstanding the fact that the surface ground granted by the said Rarus patent did not cover or extend over the said Rarus lode the defendant

15 contends and claim- that the said patent of the Rarus claim granted to them and their predecessors in interest the said Rarus lode beyond the surface ground granted by the Rarus patent and to the full extent thereof of 1,318 linear feet and also contend and claim that by reason of the ownership of the said lode for the length aforesaid, and that by reason of the fact that the same passes through the east end line of the Rarus claim, as patented and the west end line of the original location of the said claim, that they are entitled to follow said veins on their course or dip into the earth

and without the line of the Rarus claim, both as originally located and as patented.

Your orator further shows that a large portion of the ground which it is claimed by the defendant was originally included within the location of the Rarus claim, has been patented under the said Johnstown patent, hereinbefore referred to and as shown by the portion shaded in yellow on the plat attached to the said Johnstown patent.

That notwithstanding that a portion of the Rarus location was patented under the Johnstown claim, the defendants contend and claim that only the surface ground of the Johnstown claim was patented to the patentees therein named and that all veins lying within the original location lines of the Rarus claim were patented to the claimants under the Rarus claim and that defendants are entitled to claim the said veins extending through the Johnstown patent under and by virtue of the Rarus patent and that its extralateral right should be determined by the Rarus and not by the Johnstown patent.

Your orator further shows to your honors that it disputes each and every one of the claims made by the defendants, relative to the construction of said several patents, and claims that all veins, whose apexes lie within the Johnstown patent must be governed
16 and regulated in extralateral rights, if any they have, under the Johnstown patent and not under and by virtue of the Rarus patent.

And your orator further shows to your honors that the defendants claim that if they have no right to follow the veins within the lines of the original Rarus location, by virtue of the said Rarus patent, that they have a right to follow the same under and by virtue of the Johnstown patent or the Johnstown and Rarus patents combined, under and beneath that portion — the Pennsylvania Lode claim belonging to this complainant; but opposed to this contention the complainant contends and insists that the defendants have no right to follow any vein, having its apex either within the Johnstown or Rarus patent, under any circumstances into or under the Pennsylvania Lode claim, at any point east of the intersection of the south side line of the Johnstown patent with the south side line of the original Rarus location.

And your orator further shows to your honors that the said defendants contend and claim that the complainant cannot under any circumstances obtain any relief for ores extracted within that portion of the premises owned by it, without first showing that the apices of the veins from which the ores were extracted, are within the surface lines of the ground owned and claimed by the complainant, whereas your orator claims that *prima facie* it is the owner of all ores found within its boundary extended downward into the earth, until it has been shown that some other person or company has some right thereto by reason of ownership of the apex of the vein within some other claim.

And your orator further shows to your honors that it is claimed by the defendants that the apex of the veins from which the ores in

question were extracted, is divided in that a portion thereof is claimed by the defendants as upon the Rarus Lode claim and a portion thereof upon the Johnstown Lode claim and a portion
17 thereof upon the Pennsylvania Lode claim. And defendants claim that by reason of the said divided apex that they may claim the right to follow the said vein beneath the surface and without the lines of the Rarus and Johnstown claims, under and by virtue of either or both of the said claims, at thier election.

Complainant alleges that if any such veins as is claimed by the defendants exists that they have no extralateral rights, by reason of the fact that the same has a divided apex.

Wherefore, your orator shows to your honors that there is involved in the matters in controversy, between your orator and the said defendants, the numerous questions aforesaid, involving the construction of the statutes of the United States, relative to locating, purchasing and patenting of mineral lands and the construction of such statutes, relative to the right of one claimant to follow veins down to and into the premises of another, under the circumstances and situation of the parties as hereinbefore set out, and also the construction of said statutes in relation to patenting of claims and whether the veins can be patented to one person and the surface to another, and to the right of the Land Department to segregate the surface from the mineral in the ground, granting one to one person and the other to another, and as to whether said action is authorized under and by virtue of said statutes; and also as to whether when an apex of a vein is divided upon the surface part being within the premises granted in one patent and a part within another, as to what, if any extralateral rights, are granted under such circumstances to either party.

Wherefore, your complainant prays that the said defendants, Montana Ore Purchasing Company, F. Augustus Heinze and Arthur P. Heinze, their servants, agents, attorneys and employés, be by this court forever enjoined and restrained from mining or extract-
18 ing any ores from within the limits of that portion of the said Pennsylvania Lode claim, hereinbefore described and from removing therefrom any ores which have heretofore been extracted therefrom or which may hereafter be extracted therefrom, and that until the hearing of the application of this complainant for an injunction and pending the determination of the title to the said premises, that the said defendants, their agents, servants, attorneys and employés be restrained and enjoined from mining or extracting ores from within the said portion of the Pennsylvania Lode claim hereinbefore described and from removing any ores which they have extracted therefrom or any they may hereafter extract therefrom.

Your complainant further prays this honorable court to grant unto your complainant, not only a writ of injunction conformable to the prayer of this bill, but also a writ of subpœna of the United States of America, issuing out of and under the seal of this court to be directed to the said Montana Ore Purchasing Company, F. Augustus Heinze and Arthur P. Heinze, defendants, commanding

them by a day certain to appear before your honors in the court aforesaid, and answer unto this bill of complaint, and abide the order and decree of this court and for such other and further relief as may be meet and equitable in the premises.

JOHN F. FORBIS,
Of Butte, Montana, Solicitor and Counsel for Complainant.

THE UNITED STATES OF AMERICA,
District of Montana, State of Montana, } ss:
County of Silver Bow,

On this 28th day of March 1898, before me, personally appeared John F. Forbis, who being first duly sworn, made solemn oath that he is attorney for the complainant in the above-entitled bill and that all the officers of said complainant are absent from the dis-
19 trict and State of Montana; that he has read the *following* bill of complaint and knows the contents thereof and that the same is true.

JOHN F. FORBIS.

Subscribed and sworn to before me this 28th day of March, 1898.

CHARLES W. BLAIR,
Deputy Clerk, United States Circuit Court,
[SEAL.] *Ninth Circuit, District of Montana.*

20 EXHIBIT "A."

THE UNITED STATES OF AMERICA.

General Land Office No., 9457; mineral certificate No. 993.

To all to whom these presents shall come, Greeting:

Whereas, in pursuance of the provisions of the Revised Statutes of the United States, chapter six, title thirty-two, there have been deposited in the General Land Office of the United States the plat and field-notes of survey of the claim of Stanislaus E. Hirbour, Joseph Ortyer, Eugene Fornier, Peter Tetrault, and the heirs of Michael Roy, deceased, upon the Rarus lode, accompanied by the certificate of the register of the land office at Helena, in the Territory of Montana, whereby it appears that, in pursuance of the said Revised Statutes of the United States, the said Stanislaus E. Hirbour, Joseph Orytyer, Eugene Fournier, Peter Tetrault, and the heirs of Michael Roy, deceased, did on the twelfth day of May, A. D. 1883, enter and pay for said mining claim or premises, being mineral entry No. 993, in the series of said office, designated by the surveyor general as lot No. 179, embracing a portion of section eighteen (18) in township three (3) north, of range seven (7) west of the principal meridian, in the Summit Valley mining district, in the county of Silver Bow and Territory of Montana, in the district of lands
21 subject to sale at Helena, containing two and ninety-eight hundredths—$\frac{98}{100}$—acres of land, more or less, and according

to the returns on file in the General Land Office, bounded, described and platted as follows, with magnetic variations at twenty (20) degrees east, to wit: Beginning at corner number one, a granite stone 16 x 13 x 8 inches in size, marked "1, M. C. 79," from which corner number one of lot No. 113, patented to W. J. McNamara *et al.*, with their claim upon the Mountain View lode, bears south fifty-seven (57) degrees, fifty-seven (57) minutes west at the distance of one hundred and seventy (170) feet, and the quarter-section corner on north boundary of section eighteen (18) in township three (3) north of range seven (7) west, of the principal meridian, bears north eighty-five (85) degrees, eighteen (18) minutes forty (40) seconds west at the distance of seven hundred and eighty-four and one-tenth ($784\frac{1}{10}$th) feet; thence from said corner No. one south twenty-five (25) degrees, forty (40) minutes west, thirty-five (35) feet, to a granite stone 18 x 18 x 6 inches in size, marked "P. L. M. C. 126–179," situate on northerly boundary of lot No. 126, made for the Little Ida lode, seventy-two and five-tenths ($72\frac{5}{10}$ths) feet, to a granite stone 18 x 16 x 4 inches in size, marked "P. I. M. C. 173–179," situate on northerly boundary of lot No. 173, made for the claim of William Harris, Sr., *et al.*, upon the Johnstown lode, four hundred and twenty-two (422) feet to corner number 2, a granite stone 24 x 8 x 6 inches in size, with mound of stones, marked "2 M. C. 179," from which corner number
22 one of said lot No. 126, the same being corner No. 2 of lot No. 64, patented to C. X. Larabie, with his claim upon the St. Lawrence lode, bears north thirty-five (35) degrees, thirty-four (34) minutes west at the distance of two hundred and ninety (290) feet, and corner number one of said lot No. 173, bears north thirty-one (31) degrees, twenty-four (24) minutes west at the distance of three hundred and thirty-nine (339) feet; thence from said corner No. 2, south sixty-nine (69) degrees twenty-five (25) minutes east, two hundred and seventy-seven (277) feet to a granite stone 18 x 18 x 6 inches in size, marked "P. I. M. C. 126–179," situate on southerly boundary of said lot No. 126, from which corner number three of said lot No. 126 bears north seventy-two (72) degrees, fifty-two (52) minutes east at the distance of four hundred and eighty-two (482), seven hundred (700) feet, to a granite stone 22 x 8 x 6 inches in size, marked "P. I. M. C. 173–179," situate on southerly boundary of said lot No. 173, from which corner No. 3 of said lot No. 173, bears north eighty-five (85) degrees thirty (30) minutes east at the distance of five hundred and sixty-seven (567) feet, eight hundred and seventy-one (871) feet, to a granite stone 18 x 7 x 4 inches in size, marked "P. I. M. C. 172–179," situate on northerly boundary of lot No. 172, made for the claim of William Harris, Sr., *et al.*, upon the Pennsylvania lode, from which corner number two of said lot No. 172, bears south eighty-eight (88) degrees, fifteen (15) minutes east, at the distance of one hundred and thirty (130) feet; number three shaft bears north fifteen (15) degrees west at the distance of one hun-
23 dred and ninety-one (191) feet, and number two shaft bears north twenty-two (22) degrees east at the distance of one hundred and thirty-two (132), ten hundred and seven (1007) feet, to a granite stone 20 x 12 x 4 inches in size, marked "P. I. M. C. 172–179,"

situate on easterly boundary of said lot No. 172, from which corner No. 2 of said lot No. 172 bears north four (4) degrees, thirty (30) minutes east at the distance of forty-four (44) feet, and discovery shaft bears north ten (10) degrees east, at the distance of one hundred and forty-three (143) feet, thirteen hundred and sixteen (1316) feet to corner number three, a granite stone 22 x 10 x 6 inches in size, marked "3 M. C. 179," from which corner No. 2 of said lot No. 172 bears north sixty-one (61) degrees, twenty (20) minutes west, at the distance of three hundred and twenty-one (321) feet; thence from said corner No. 3 north twenty-five (25) degrees, forty (40) minutes east, one hundred and twelve (112) feet, to a point from which the face of a tunnel bears north sixty-five (65) degrees west at the distance of eighty-seven (87) feet, four hundred and forty (440) feet, to corner number four, a granite stone 18 x 8 x 6 inches in size, marked "4 M. C. 179"; thence north seventy (70) degrees, nine (9) minutes, two hundred and forty-six (246) feet to a granite stone 20 x 8 x 5 inches in size, marked "P. I. M. C. 173–179," situate on easterly boundary of said lot No. 173, from which corner number three of said lot No. 173 bears south eight (8) degrees, thirty (30) minutes east, at the distance of two hundred and nineteen (219) feet,
24 seven hundred and sixty-eight (768) feet, to a granite stone 18 x 8 x 6 inches in size, marked "P. I. M. C. 126–179," situate on easterly boundary of said lot No. 126, from which corner number three of said lot No. 126 bears south eight (8) degrees, thirty (30) minutes, at the distance of one hundred and fifty (150) feet, eleven hundred and sixty-eight (1168) feet, to a granite stone 18 x 8 x 8 inches in size marked "P. I. M. C. 173–179," situate on northerly boundary of said lot No. 173, from which the point of intersection of westerly boundary of this claim, with the northerly boundary of said lot No. 173, bears south eighty-five (85) degrees, thirty (30) minutes west, at the distance of one hundred and seventy-four (174) feet; twelve hundred and seventy-eight (1278) feet, to a granite stone 16 x 10 x 6 inches in size, marked "P. I. M. C. 126–179," situate on northerly boundary of said lot No. 126, from which the point of intersection of westerly boundary of this claim with the northerly boundary of said lot No. 126, bears south seventy-two (72) degrees west, at the distance of fifty-six (56) feet, thirteen hundred and eighteen (1318) feet, to the place of beginning, containing two and ninety-eight-hundredths ($2\frac{98}{100}$ths) acres of land, more or less, and embracing thirteen hundred and eighteen (1318) linear feet of the said Rarus lode, as represented by yellow shading in the following plat:

(Here follows map marked p. 25.)

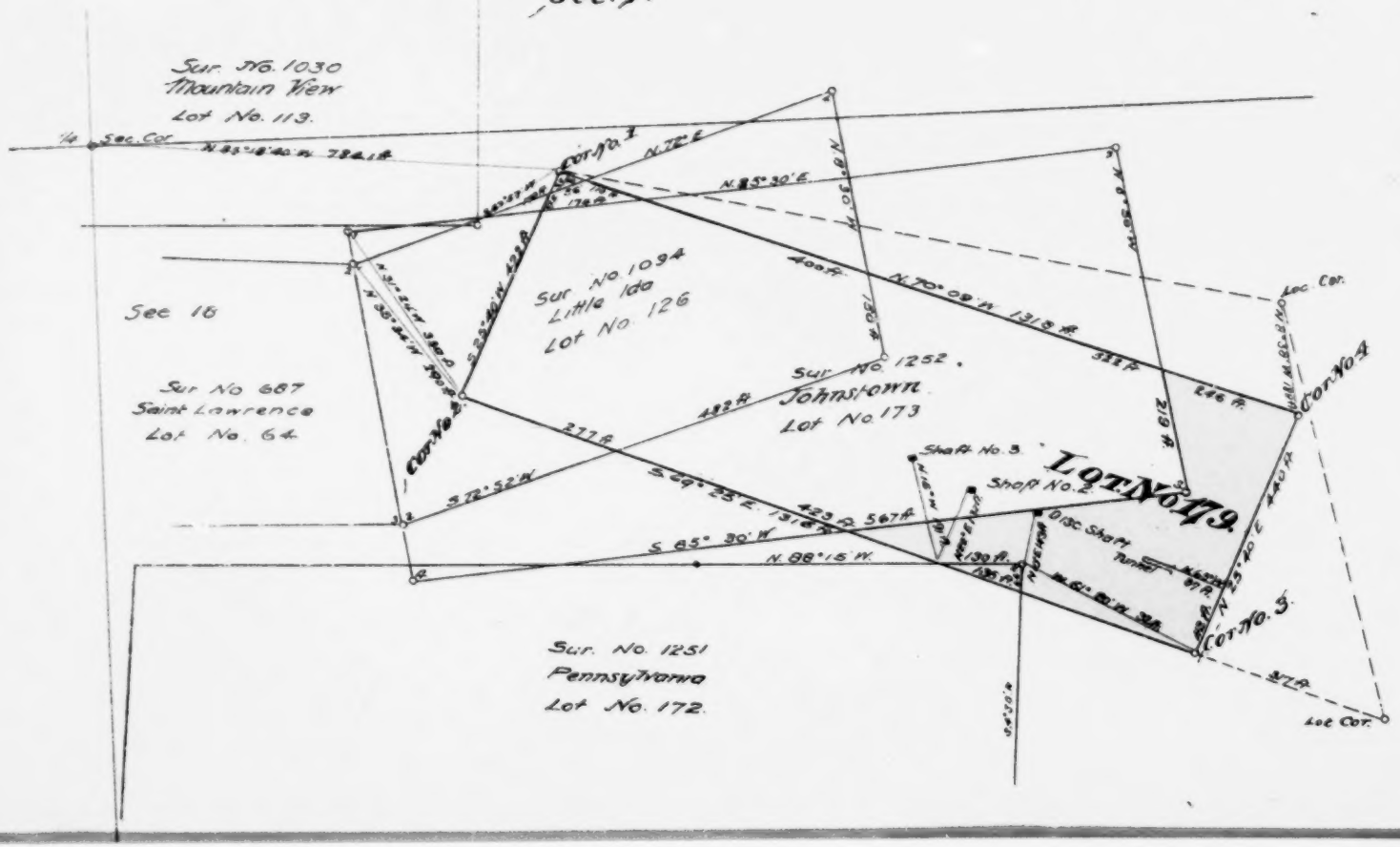
26 Now know ye, that the United States of America, in consideration of the premises, and in conformity with said Revised Statutes of the United States, have given and granted, and by these presents do give and grant, unto the said Stainlas E. Hirbour, Joseph Ortyer, Eugene Fournier, Peter Tetrealt, and the heirs of Michael Roy, deceased, and to their heirs and assigns, the said mining premises hereinbefore described as lot No. 179, em-

13689

Plat
of the Claim of
Stanislas E. Hirbour et al.
UPON THE
Rarus Lode
Summit Valley Mining District, Silver Bow County
Montana.
Containing 2.98 Acres.
Scale 200 ft to an inch
Var 20° E.

No. 324
B.M.C. Cts. N.C. } 25
M.M. & P. Co. Ltd

T. 3 N. R 7 W.
Surveyed
Sec. 7.



bracing a portion of section eighteen (18) in township three (3) north of range seven (7) west of the principal meridian, with the exclusive right of possession and enjoyment of all the land included within the exterior lines of said survey not herein expressly excepted from these presents, and of thirteen hundred and eighteen (1318) linear feet of the said Rarus vein, lode, ledge, or deposit for the length hereinbefore described, throughout its entire depth, although it may enter the land adjoining, and also of all other veins, lodes, ledges or deposits throughout their entire depth, the tops or apexes of which lie inside the exterior lines of said survey at the surface extended downward vertically, although such veins, lodes, ledges, or deposits in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said survey; provided, that the right of possession hereby granted to such outside parts of said veins, lodes, ledges, or
27 deposits shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said survey at the surface, so continued in their own direction that such vertical planes will intersect such exterior parts of said veins, lodes, ledges, or deposits. Excepting and excluding, however, from these present- all that portion of the surface ground: hereinbefore described, which is embraced by said lots Nos. 126, 172 and 173; and provided further, that nothing in this conveyance shall authorize the grantees herein, their heirs or assigns, to enter upon the surface of a mining claim owned or possessed by another. To have and to hold the said mining premises, together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging unto the said Stainslas E. Hirbour, Joseph Ortyer, Eugene Fournier, Peter Tetrault, and the heirs of Michael Roy, deceased, and to their heirs and assigns forever, subject, nevertheless, to the following conditions and stipulations:

First. That the grant hereby made is restricted to the land hereinbefore described as lot No. 179, with thirteen hundred and eighteen (1318) linear feet of the Rarus vein, lode, ledge, or deposit for the length aforesaid throughout its entire depth as aforesaid, together with all other veins, lodes, ledges, or deposits throughout their entire depths, as aforesaid, the tops or apexes of which lie inside the exterior lines of said survey.

28 Second. That the premises hereby conveyed, with the exception of the surface, may be entered by the proprietor of any other vein, lode, ledge or deposit, the top or apex of which lies outside the exterior limits of said survey, should the same in its downward course be found to penetrate, intersect, extend into, or underlie the premises hereby granted, for the purpose of extracting and removing the ore from such other vein, lode, ledge or deposit.

Third. That the premises hereby conveyed shall be held subject to any vested and approved water rights for mining, agriculture, manufacturing or other purpose, the rights to ditches and reservoirs used in connection with such water rights as may be recog-

nized and acknowledged by the local laws, customs and decisions of courts.

Fourth. That in the absence of necessary legislation by Congress, the legislature of Montana may provide rules for working the mining claims or premises hereby granted, involving easements, drainage and other necessary means to its complete development.

In testimony whereof, I, Chester A. Arthur, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the
29 twenty-fifth day of June, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States one hundred and eighth.

By the President.

CHESTER A. ARTHUR,
By W. H. COOK, *Secretary.*

[General Land Office Seal.]

S. W. CLARK,
Recorder of the General Land Office.

"Examined."

Recorded, vol. 112, pages 345 to 348, inclusive.

Filed for record, February 23rd, A. D. 1895, at fifty minutes past nine o'clock a. m.

C. Q. JOHNSON,
County Recorder,
By A. E. WHIPPS, *Deputy.*

STATE OF MONTANA, }
County of Silver Bow, } ss:

I, John Weston, county clerk and recorder of said county, do hereby certify that the annexed instrument is a full, true and correct copy of the original instrument, as recorded at page 190 in Book C of U. S. Patents, Records of Silver Bow County, Montana.

Attest my hand and the seal of said Silver Bow county hereunto affixed this 18th day of May, 1897.

JOHN WESTON,
County Clerk and Recorder,
By J. E. MORAN, *Deputy.*

30 EXHIBIT "B."

THE UNITED STATES OF AMERICA.

General Land Office No., 9893; mineral certificate No. 1012.

To all to whom these presents shall come, Greeting:

Whereas, in pursuance of the provisions of the Revised Statutes of the United States, chapter six, title thirty-two, there has been deposited in the General Land Office of the United States, the plat

and field-notes of survey of the claim of William Harris, Sr., William Harris, Jr., John E. Lloyd, Thomas E. Lloyd, Jeremiah Griffith, Thomas Griffith and John H. Davis, upon the Johnstown lode, accompanied by the certificate of the register of the land office at Helena, in the Territory of Montana, whereby it appears that, in pursuance of the said Revised Statutes of the United States, the said William Harris, Sr., William Harris, Jr., John E. Lloyd, David J. Lloyd, Thomas E. Lloyd, Jeremiah Griffith, Thomas Griffith and John H. Davis, did, on the first day of December, A. D. 1883, enter and pay for said mining claim or premises, being mineral entry number 1012 in the series of said office, designated by the surveyor general as lot No. 173, embracing a portion of section eighteen (18),
31 in township three (3) north of range seven (7) west of the principal meridian in the Summit Valley mining district, in the county of Silver Bow and Territory of Montana, in the district of land subject to sale at Helena, containing eighteen (18) acres of land, more or less, and according to the returns on file in the General Land Office, bounded, described and platted as follows, with magnetic variation as hereinafter stated, to wit: Beginning at corner number one, a granite stone 19 x 10 x 6 inches in size, marked "I. M. C. 173," from which the quarter-section corner on north boundary of section eighteen (18) in township three (3) north of range seven (7) west of the principal meridian bears, with magnetic variation at twenty (20) degrees east, north sixty-nine (69) degrees, forty-nine (49) minutes, and twenty-seven (27) seconds west at the distance of four hundred and forty-nine and seven-tenths ($449\frac{7}{10}$) feet, corner number two (2) of lot number one hundred and twenty-seven (127), the Smelter Lode claim bears north sixty-three (63) degrees east at the distance of two hundred and eighteen (218) feet, and corner number one of lot number one hundred and thirteen, the Mountain View Lode claim bears east at the distance of two hundred and twenty-three (223) feet; thence, from said corner number one, north eighty-five (85) degrees thirty (30) minutes east, seventy-three (73) feet to a granite stone eighteen by 8 by 6 inches in size, marked "P. I. M. C. 113–173," situate on southerly boundary of said lot No. 113, from which corner number one of said lot No.
32 113, bears south eighty-seven (87) degrees, thirty (30) minutes east at the distance of one hundred and forty-five (145) feet and the point of intersection of the southerly boundary of said lot No. 113, to the northerly boundary of lot No. 126, the Little Ida Lode claim, bears south eighty-seven (87) degrees, thirty (30) minutes east at the distance of one hundred (100) feet; two hundred and nineteen (219) feet to a granite stone 16 x 12 x 10 inches in size, marked "P. I. M. C. 113–126 and 173," situate on easterly boundary of said lot No. 113, and northerly boundary of said lot No. 126, from which corner number one of said lot No. 113, bears south two (2) degrees, thirty (30) minutes west at the distance of seventeen (17) —, eight hundred and fifty-seven (857) feet to a granite stone 16 x 6 x 5 inches in size, marked "P. I. M. C. 126–173," situate on the easterly boundary of said lot No. 126, from which corner number three of said lot No. 126, bears south eight (8) degrees thirty (30) minutes

east at a distance of three hundred and sixteen (316) feet, thirteen hundred and seventeen (1317) feet to corner number 2 a granite stone 18 x 10 x 8 inches in size, marked "M. C. 173;" thence south eight (8) degrees thirty (30) minutes east six hundred (600) feet, to corner number three, a granite stone 26 x 12 x 6 inches in size, with mound of stones, marked "3 M. C. 173;" thence south eighty-five (85) degrees, thirty (30) minutes west, ten hundred and eighty-five (1085) feet to a granite stone 24 x 16 x 6 inches in size, marked "P. I. M. C. 172–173," situate on northerly boundary of lot No. 172 the Pennsylvania Lode claim, thirteen hundred and seventeen (1317) feet to corner number four a granite stone 33 30 x 12 x 10 inches in size with mound of stones, marked "4 M. C. 173," from which the face of a tunnel bears, with magnetic variation at nineteen (19) degrees, forty-five (45) minutes east, south six (6) degrees east at the distance of six hundred and thirty-nine (639) feet, and corner number one of said lot No. 172, bears north eighty-five (85) degrees, fifteen (15) minutes west at the distance of four hundred and sixty-one (461) —; thence from said corner number four, north eight (8) degrees, thirty (30) minutes west twenty-five (25) feet to a granite stone 18 x 8 x 6 inches in size, marked "P. I. M. C. 172–173," situate on northerly boundary of said lot No. 172, from which corner number one of said lot No. 172, bears north eighty-eight (88) degrees, fifteen (15) minutes west at the distance of four hundred and fifty-six (456) —, and the point of intersection of northerly boundary of said lot No. 172 with the southerly boundary of this claim, bears south eighty-eight (88) degrees, fifteen (15) minutes east at the distance of two hundred and thirty-five (235) feet; ninety-three (93) feet to corner number 3 of lot No. 64, the St. Lawrence Lode claim, and also corner number two, of said lot No. 126, from which corner No. 3 of said lot No. 126 bears north seventy-two (72) degrees, fifty-two (52) minutes east at the distance of eight hundred and sixty-five (865) feet, three hundred (300) feet to a point, from which discovery shaft bears north eighty-five (85) degrees, thirty (30) minutes east at the distance of two hundred and fifty (250) feet, five hundred and forty-six (546) feet to corner number two of said lot number 64, and also corner number one 34 of said lot No. 126, from which the point of intersection of the southerly boundary of said lot No. 113, with the northerly boundary of said lot No. 126, bears north seventy-two (72) degrees east at the distance of one hundred and seventy-four (174) feet, and the point of intersection of the northerly boundary of said lot with the northerly boundary of this claim and easterly boundary of said lot No. 113, bears north seventy-two (72) — east at the distance of two hundred and twenty-two (222) feet; six hundred (600) feet to the place of beginning, containing eighteen (18) acres of land, more or less, and embracing thirteen hundred and seventeen (1317) linear feet of the said Johnstown lode, as represented by yellow shading in the following plat:

(Here follows map marked p. 35.)

Plat

of the Claim of William Harris, Sr. et al upon the

Johnstown Lode.

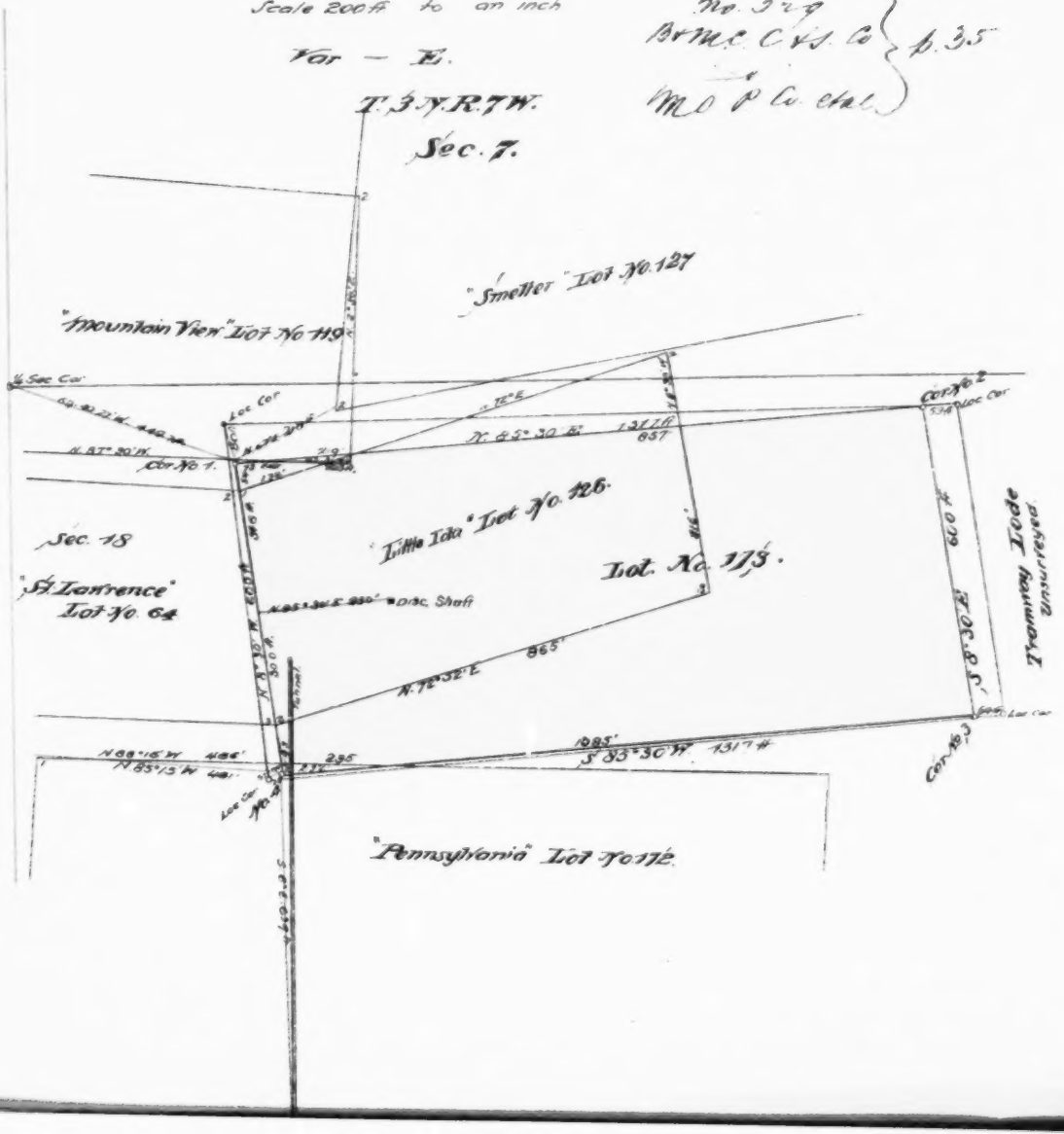
Summit Valley Mining District, Silver Bow County, Montana

Containing 18.00 Acres

Scale 200 ft. to an inch

For — E.

No. 3 & 9
Bt M.C. C & S. Co } b. 3.5
M & P Co. et al



36 Now know ye; that the United States of America, in consideration of the premises, and in conformity of the said Revised Statutes of the United States, have given and granted, and by these presents do give and grant, unto the said William Harris, Sr., William Harris, Jr., John E. Lloyd, David J. Lloyd, Thomas E. Lloyd, Jeremiah Griffith, Thomas Griffith and John H. Davis, and to their heirs, and assigns, the said mining premises hereinbefore described as lot No. 173, embracing a portion of section eighteen (18) in township three (3) north of range seven (7) west of the principal meridian, with the exclusive right of possession and enjoyment of all the land included within the exterior lines of said survey not herein expressly excepted from these presents, and of thirteen hundred and seventeen (1317) linear feet of the said Johnstown vein, lode, ledge or deposit for the length hereinbefore described, throughout its entire depth, although it may enter the land adjoining, and also of all other veins, lodes, ledges or deposits throughout their entire depth, the tops or apexes of which lie inside the exterior lines of said survey at the surface extended downward vertically, although such veins, lodes, ledges or deposits in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said survey; provided that the right of possession
37 hereby granted to such outside parts of said veins, lodes, ledges or deposits shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said survey at the surface, so continued in their own direction that such vertical planes will intersect such exterior parts of said veins, lodes, ledges or deposits; excepting and excluding, however, from these presents all that portion of the surface ground hereinbefore described, which is embraced by said lots Nos. 113 and 172. And provided further, that nothing in this conveyance shall authorize the grantees herein, their heirs or assigns, to enter upon the surface of a mining claim owned or possessed by another; to have and to hold said mining premises, together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging unto the said William Harris, Sr., William Harris, Jr., John E. Lloyd, David J. Lloyd, Thomas E. Lloyd, Jeremiah Griffith, Thomas Griffith and John H. Davis, and to their heirs and assigns forever, subject nevertheless to the following conditions and stipulations:

First. That the grant hereby made is restricted to the land hereinbefore described as lot No. 173 with thirteen hundred and seventeen (1317) linear feet of the Johnstown vein, lode, ledge or deposit for the length aforesaid, through its entire depth as aforesaid, together with all other veins, lodes, ledges or deposits, throughout their entire depths as aforesaid, the tops or apexes of which lie inside the exterior lines of said survey.

38 Second. That the premises thereby conveyed, with the exception of the surface, may be entered by the proprietor of any other vein, lode, ledge or deposit, the top or apex of which lies outside the exterior limits of said survey, should the same in its downward course be found to penetrate, intersect extend into or

underlie the premises hereby granted, for the purpose of extracting and removing the ore from such other vein, lode, ledge or deposit.

Third. That the premises hereby conveyed shall be held subject to any vested and accrued water rights for mining, agriculture, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local laws, customs and decisions of courts.

Fourth. That in the absence of necessary legislation by Congress, the legislature of Montana may provide rules for working the mining claim or premises hereby granted, involving easement, drainage and other necessary means to its complete development.

In testimony whereof, I, Chester A. Arthur, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, the fifteenth day of November, in the year of our Lord one
39 thousand eight hundred and eighty-four, and of the Independence of the United States the one hundred and ninth.

By the President,

CHESTER A. ARTHUR,
By M. McKEAN, *Secretary.*

[Seal of the General Land Office.]

S. W. CLARK,
Recorder of the General Land Office.

Recorded vol. 117, pages 329 to 333 inclusive.
Examined.
Filed for record March 12th, A. D. 1890, at 5 minutes past two o'clock p. m.

C. F. BOOTH,
County Recorder.

STATE OF MONTANA, } ss:
County of Silver Bow, }

I, John Weston, county clerk and recorder in and for said county and State, do hereby certify that the annexed instrument is a full, true, and correct copy of the original instrument as recorded at page 29 in Book B of U. S. Patents, records of Silver Bow county, Montana.

Attest my hand and the seal of said Silver Bow county hereunto affixed this 26th day of March, A. D. 1897.

JOHN WESTON,
County Clerk and Recorder,
By A. E. WHIPPS, *Deputy.*

40 Endorsed: (Title of court and cause.) Amended bill of complaint. Filed and entered March 28, 1898. Geo. W. Sproule, clerk, by Charles W. Blair, deputy clerk.

And thereafter to wit, on the 7th day of April 1898, the separate answer of defendant Montana Ore Purchasing Company was filed which is in the words and figures as follows, to wit:

41 In the Circuit Court of the United States, Ninth Circuit, for the District of Montana, Southern Division.

BOSTON AND MONTANA CONSOLIDATED Copper & Silver Mining Company, a Corporation, Complainant, *vs.* MONTANA ORE PURCHASING COMPANY, a Corporation; F. Augustus Heinze, and Arthur P. Heinze, Defendants.	In Equity. No. 35. Separate Answer of Montana Ore Purchasing Company to Complainant's Amended Bill of Complaint.

This defendant, Montana Ore Purchasing Company, now and at all times hereinafter saving to itself all and all manner of benefit and advantage of exception that can or may be had or taken to the many errors, uncertainties and imperfections in the said amended bill of complaint, for answer thereto, or to so much thereof, as this defendant is advised it is material or necessary for it to make answer to, answering, says:

I.

That it admits that the complainant is a corporation organized and existing under and by virtue of the laws of the State of Montana, with its principal place of business at Butte city, Silver Bow county in said State.

That this defendant is now and at all times mentioned in said complaint was a corporation duly organized and existing under and by virtue of the laws of the State of Montana, having its principal place of business at Butte city, Siver Bow county, in said State.

Admits that the complainant is the owner of the surface ground of that portion of the Pennsylvania Lode claim described in its complaint, but denies that the complainant is the owner of or entitled to the lode or veins, or ore bodies upon which the defendant has entered and from which it has extracted the ores in question in this case, and alleges that defendant is the owner of said

42 veins or lodes and ore bodies.

Admits that complainant acquired title to the Pennsylvania Lode claim by *by* virtue of the several deeds of conveyance set out in its amended bill of complaint.

II.

Denies that on or about the first day of April, 1895, or at any other time, or at all, the defendant wrongfully or unlawfully enter upon or into the premises of the complainant, to wit, the Pennsylvania Lode claim as described by it, by underground workings, or tunnels, or shafts, or cross-cuts, or levels, or otherwise or at all, or extracted from the said premises of complainant large or any quantities of valuable ores, or any ores, to the amount of one hundred and fifty thousand (150,000) tons, more or less, or to any amount whatever, or of the value of five hundred thousand dollars ($500,000), more or less, or of any value whatever.

And denies that ever since said time, or at all, defendant has con-

tinued to mine, or extract ores from said premises belonging to the complainant, or is now extracting ores therefrom, or threatens so to do, or that it ever or at all mined or extracted ores from the said premises belonging to the complainant, or threatened so to do, as alleged in complainant's complaint, or otherwise, or at all, and denies that it will do so unless restrained by the injunction of this court.

Denies that complainant's ground is valuable for ores, as alleged in complainant's complaint, and denies that it is these ores, or any ores belonging to the complainant, that defendant has extracted or is extracting, or is threatening to extract therefrom.

Denies that the ground owned by the complainant is of the reasonable value of more than $100,000, and denies that the ores which the defendant is extracting, or is threatening to extract, are of a value in excess of $50,000, or that the same are of any value to the complainant, or that complainant has any right, title, or interest therein or thereto.

43 Denies that the complainant has no means of ascertaining the quantity or value of the ores which the defendant is extracting or may extract from the said premises; and denies that if the defendant is permitted or allowed to continue to extract said ores that it would be uncertain and indefinite as to what amount of ores or the value thereof might be extracted in the future by the defendant; and denies that the complainant would be compelled to rely to a great extent or to any extent upon the good faith or showing of the defendant as to the amount or value of the ores which it has heretofore extracted or may hereafter extract from said premises.

Denies that unless the defendant is enjoined or restrained from mining or extracting ores from said premises, that the complainant will be required to bring numerous actions or any actions for the determination of the damages which it has sustained or will sustain by reason of the extraction of said ores by the defendant; and denies that complainant has sustained or will sustain any damages on account thereof.

And denies that defendant is trespassing upon the premises of complainant, or that any trespasses on the part of defendant are continuing from time to time; and denies that the defendant is intending to trespass upon the premises or rights of the complainant.

And defendant further denies that by reason of the trespasses upon its part on the premises of the complainant, complainant has suffered or will continue to suffer great or irreparable injury or damage, or will suffer any injury or damage at all on account of any act of the defendant; and denies that this defendant is trespassing upon the property of the complainant or threatens so to do.

III.

Defendant denies that the determination of the controversy between the complainant and defendant involves a construction of title 23, chapter 6, of the Revised Statutes of the United States, concerning mines and mineral lands, in the manner stated in com-

plainant's amended bill of complaint, and denies that said
44 controversy involves a construction of the same in any manner or at all, and denies that the controversy between the complainant and defendant involves a construction of any statute of the United States whatever.

Defendant admits that the Pennsylvania Lode claim claimed in part by complainant, is a mining claim located under the provisions of the statutes of the United States relative to the appropriation of mineral lands, and that the same has been patented as a mining claim.

Admits that the Rarus Lode claim, and the Johnstown Lode claim are mineral claims located under the laws of the United States, relative to the appropriation and location of mineral lands, and that the same have been patented under the laws of the United States.

Admits that the defendant owns a portion of that certain lode mining claim known as and called the Rarus Lode claim, lot No. 179, T. 3 N. R. 7 W., in Silver Bow county, Montana, and also a parcel of ground with all the veins, lodes and ledges having their top or apex therein, with all their dips, spurs and angles, which parcel of ground lies within the lines of the Johnstown Lode claim, lot No. 173, T. 3 N. R. 7 W., in Silver Bow county, Montana. And admits that said Rarus and Johnstown Lode claims lie north of and partly adjoining, and near to the Pennsylvania Lode claim.

Denies that the defendant owns any portion of the Little Ida Lode mining claim, lot No. 126.

Defendant alleges that it is the owner of said parcel of ground as above admitted, within the Johnstown Lode claim, and as hereinafter described, and also that it is the owner of that portion of the Pennsylvania Lode claim hereinafter described. Defendant admits that it claims the right to enter upon the premises of complainant, to wit, that portion of the Pennsylvania Lode claim described in its amended bill of complaint by reason of the fact that certain veins
owned and claimed by the defendant, and in its possession,
45 have their top or apices within the said Johnstown Lode claim, lot No. 173, and that portion thereof owned by the defendant, and that the defendant asserts the right to follow such veins on their downward course or dip, although the same so far depart from a perpendicular as to depart from the said Johnstown Lode claim, and from that portion thereof owned by the defendant, and enter the premises owned and claimed by the complainant, to wit, that portion of the Pennsylvania Lode claim described in its said amended bill of complaint. But defendant denies that it claims the right to enter upon the premises of the complainant, to wit; that portion of the Pennsylvania Lode claim described in its amended bill of complaint, by reason of the fact that any veins owned or claimed by defendant or in its possession have their top or apices within the Rarus Lode claim, or in that portion thereof owned by defendant, or by reason of the fact that the same have their top or apices within the Little Ida Lode claim, or any portion thereof, and denies that it asserts the right or any right to follow such veins on their downward course or dip, although the same so far depart from a per

pendicular as to depart from said Rarus Lode claim, and to enter the premises claimed by this complainant; and denies that it asserts or claims the right to enter the premises of the complainant by reason of the fact that any veins owned or claimed by defendant have their top or apices in said lode claim or any part thereof, but alleges that the defendant claims the right to enter the premises of the complainant by reason of the fact that certain veins have their top or apices within that portion of the Johnstown Lode claim owned by defendant, and that it asserts the right to follow such veins on their downward course or dip, although the same so far depart from a perpendicular as to depart from said Johnstown Lode claim and from the portions thereof owned by defendant and to enter the premises of complainant.

And defendant alleges that the vein or lode upon which it has mined within the lines of the Pennsylvania Lode claim and underneath the surface thereof has its top or apex within the Johnstown Lode claim and that portion thereof owned by the defendant. Defendant denies that said veins or lode upon which it has mined within the lines of the Pennsylvania Lode claim are not such
46 veins or is not such a lode as can be followed on their or its course downward or dip beyond the lines of defendant's possessions, to wit, that portion of the Johnstown Lode claim owned by it into the ground or premises of complainant; and denies that said veins or lode are intersected or broken by faults in such manner that the same cannot be followed or traced from the ground of the defendant, to wit, that portion of the Johnstown Lode claim owned by it, into the Pennsylvania Lode claim, and denies that therefore or for any other reason the defendant has not the right to enter upon the ground of complainant for the purpose of extracting ores from said vein or lode by reason of its ownership of the apex of the same within its ground, the said portion of the Johnstown Lode claim.

Defendant alleges that the veins or lode upon which it has been mining within the Pennsylvania Lode claim and underneath the surface thereof have their top or apex within the lines of the Johnstown Lode claim as located and patented, for the entire length of said claim, and running nearly paraliel with the side lines thereof, and that the same pass on their or its strike through the end lines of said Johnstown Lode claim as located and patented, and that said end lines are parallel.

And defendant further alleges, that the veins or lode upon which it has mined within the Pennsylvania Lode claim have their top or apex within that portion of the Johnstown Lode claim owned by it, and that the same can be followed and have been followed continuously on ore on the dip or downward course from the top or apex within the boundary lines of the Johnstown Lode claim and the boundary lines of that portion thereof owned by defendant into the ground owned or claimed by complainant, to wit, the Pennsylvania Lode claim. Defendant denies that the veins or lode from which it has been extracting ores within the premises of complainant do not on their or its course or strike depart from the end lines of defend-

ant's claims or possessions, and denies that the same depart from the side lines thereof in such a manner as to prohibit the
47 defendant from following the same beyond the side lines of its own possession, to wit, that portion of the Johnstown Lode claim owned by it, into complainant's portion of the Pennsylvania Lode claim, and denies that said veins or lode depart from the side lines of defendant's said possession or portion of the Johnstown Lode claim in any manner or at all; and denies they or it enter the Pennsylvania Lode claim in any other manner than upon the dip or downward course on a departure from the perpendicular through the side lines of said Johnstown Lode claim and of that portion thereof owned by the defendant.

Defendant admits that there are one or more veins or a lode which the defendant claims the right to follow on the dip beyond the side lines of the Johnstown Lode claim and that portion thereof owned by the defendant, into the ground of the complainant, the Pennsylvania Lode claim; and denies that any of said veins or said lode in their or its course or strike depart from the side lines of the said Johnstown Lode claim or the portion thereof owned by the defendant, but alleges the fact to be that the same on the course or strike depart from the end lines of said portion of the Johnstown Lode claim owned by the defendant, and from the end lines of said Johnstown Lode claim as located and patented.

Defendant denies that said ground claimed by the defendant, to wit, that portion of the Johnstown Lode claim hereinafter described was not so located or situated as to have any end lines whatever; and denies that the said locator or locators of the ground owned by this defendant did mark the same with end lines not parallel, or did locate the same across said vein or lode; and denies that the said Johnstown Lode claim was not so located or situated as to have any end lines whatever as provided by the statutes of the United States in such cases; and denies that in consequence of the failure on the part of the locator or locators of the said Johnstown Lode claim and the said portion thereof claimed by the defendant to mark the same with end lines parallel,
48 or to locate the same along the veins or vein, or for any other reason the defendant has no extralateral rights in or to any of the veins in its said ground, to wit, the said portion of the Johnstown Lode claim, or has not the right to follow the same into or upon the ground of the complainant. And defendant denies that the locator or locators of the said Johnstown Lode claim located the same across the veins or lode, but alleges that the same was located along the vein or lode, as required by the statutes of the United States and that the same had and has parallel end lines through which the veins and lodes having their top or apex therein pass on their course or strike.

Defendant admits that a patent was issued by the United States to Stanislas E. Hirbour and others for that certain quartz lode claim known as and called the Rarus; and also that a patent has been granted by the United States to William Harris, Sr., and others for that certain quartz lode mining claim known as and

called the Johnstown Lode claim (a copy of which patent is attached to complainant's amended bill of complaint).

And the defendant as showing to your honors that the questions involved in this case are not questions arising under the statutes of the United States, or involving the construction thereof, alleges that it does not claim to own a portion of the ground patented under both the Rarus and Johnstown patents, or that it claims in this action that by virtue of said Rarus patent it has acquired 1318 linear feet of what is designated or called the Rarus lode; and denies that it is contended in this action by the defendant that under and by virtue of said Rarus patent it or its predecessors in interest were granted 1318 linear feet to the Rarus lode, extending from what is known as the east end line of the Rarus claim to an imaginary or projected line of the Rarus location.

Defendant alleges that it claims to own, and does own whatever rights were granted under the patent for the Rarus Lode claim issued by the United States, but that it does not assert any
49 title in this action under said patent as against the complainant, but relies upon its ownership of that portion of the Johnstown and Pennsylvania Lode claims hereinafter described.

Defendant admits that the surface ground granted to the predecessors in interest of the defendant in the Rarus Lode claim is as shown by the yellow shading on the map attached to the Rarus patent, but defendant denies that it contends in this action or claims that the patent for the Rarus Lode claim granted to it or its predecessors in interest the Rarus lode beyond the surface ground granted by the Rarus patent, or to the full extent thereof of 1318 linear feet; and denies that it contends or claims in this action that by reason of the ownership of said lode for the length aforesaid, or by reason of the fact that the same passes through the east end line of the Rarus Lode claim as patented, and the west end line of the original location of said claim, that it is entitled to follow said veins on their course or dip into the earth without the lines of the Rarus Lode claim, either as originally located or as patented.

And defendant alleges that in this action it makes no claim of any right under the Rarus patent to enter upon the veins within the ground claimed or owned by the complainant, but that it asserts its right to do so by reason of its ownership of a portion of the Johnstown Lode claim, and the fact that the top or apices of the veins or lode in question are within said portion of the Johnstown Lode claim.

Defendant admits that a large portion of the ground which was originally included within the location of the Rarus claim has been patented under the said Johnstown patent, and defendant denies that in this action it contends or claims that only the surface ground of the Johnstown claim was patented to the patentees named therein or that all or any veins lying within the original location lines of the Rarus claim were patented to the claimant under the Rarus claim; and denies that it claims or contends that it is
50 entitled to claim the veins extending through the Johnstown patent under or by virtue of the Rarus patent, or that its

extralateral rights should be determined by the Rarus patent and not by the Johnstown patent; but defendant alleges that it contends and claims in this action, and in so far as this controversy between complainant and defendant is concerned, that its extralateral rights to the veins in question should be determined by its ownership of that parcel of ground now included within the Johnstown claim and not by the Rarus, for the reason that said vein- or lode- have their top or apex within the said parcel of ground owned by defendant.

Defendant denies that it makes any claim in this action that if it has no right to follow the veins within the lines of the original Rarus location by virtue of said Rarus patent, that it has a right to follow the same under and by virtue of the Johnstown patent, or of the Johnstown and Rarus patents combined, under and beneath that portion of the Pennsylvania Lode claim belonging to the complainant; and defendant asserts that it does not rely upon any combination of the Johnstown and Rarus patents in this action, but relies upon its ownership of said parcel of ground conveyed to its predecessors by the owners of the Johnstown claim and the Johnstown patent.

Defendant denies that it contends or claims that the complainant cannot under any circumstances obtain any relief for ores extracted within that part of the premises owned by complainant without first showing that the apex of the vein or veins from which the ores were extracted are within the surface lines of the ground owned and claimed by the complainant. And defendant alleges that its only contention upon this point in the case is that the complainant cannot recover for any of the ores extracted by defendant from within that portion of the premises owned by complainant, for the reason that the top or apex of the vein or lode from which
the ores have been extracted is within that parcel of
51 ground owned by defendant, and lying within the lines of
the Johnstown claim, and that it is the owner thereof by virtue of said deed of conveyance; and further that the same depart on the strike through the end lines of the Johnstown Lode claim, and that the same are therefore outside of the ground, owned or claimed by the complainant, and are within the ground owned and claimed by the defendant, and that defendant is therefore the owner of the vein or veins or lode throughout the entire depth of the same to the extent that the apex or top of the same is within the ground owned by defendant, and outside of the ground owned or claimed by the complainant.

And defendant denies that it is claimed by it that the apex of the veins from which the ores in question were extracted is divided, in that the defendant claims that a portion thereof is upon the Rarus Lode claim, and a portion thereof upon the Johnstown Lode claim, and a portion thereof upon the Pennsylvania Lode claim; and defendant denies that the apex of the vein or lode is divided at all, or that it claims or asserts in this action that the same is divided; but defendant avers that it claims that the vein or veins or lode from which the ore in question has been extracted have or has their or

its apex within the Johnstown Lode claim and that the same passes through the end lines thereof, and defendant alleges that the apex of the same is within that portion thereof owned by it.

And defendant alleges that it does not claim that by reason of a divided apex it may claim the right to follow the said vein or veins or lode beneath the surface and without the lines of the Rarus or Johnstown claim under or by virtue of either or both of said claims at its election, or otherwise, and defendant does not claim that by reason of a divided apex of the vein or veins or lode in question that it has a right to follow the same beneath the surface and without the lines of the Johnstown claim. And defend-
ant states that if there is any vein having its top or apex
52 within the Johnstown Lode claim or that portion thereof owned by defendant, and which departs on its strike from the Johnstown claim in such manner as to have a divided apex, that is to say, a portion of the apex within the Johnstown Lode claim, and a portion outside thereof and on the Rarus or Pennsylvania claim, that it does not claim the right to follow the same beneath the surface and without the lines of the Johnstown claim under and by virtue of either or both of the Rarus or Johnstown claims, or at all, and that it does not claim the right to follow the same under the Johnstown claim or patent therefore downward at any point beyond where the entire apex of the vein or lode is within the Johnstown claim and that portion thereof owned by defendant. And defendant therefore shows to your honors that there is not involved in the matters in controversy between the complainant and defendant any questions involving the construction of the statutes of the United States relative to locating, purchasing or patenting mineral lands, or any other statutes of the United States, or any construction of such statutes relative to the right of one claimant to follow veins down to and into the premises of another or any construction of said statutes in relation to the patenting of claims, or whether the vein can be patented to one person and the surface to another, or the right of the Land Office to segregate the surface from the mineral in the ground, or the right to grant one to one person and the other to another, or as to whether said action is authorized under or by virtue of said statutes, or as to whether when the apex of a vein is divided upon the surface, part being within the premises granted in one patent and a part within another, what, if any, extralateral rights are granted under such circumstances to either party.

As there is no controversy between the complainant and the defendant in this action upon any of the matters or things suggested or stated by the complainant in its amended bill of complaint, for the purpose of showing that this court has jurisdiction, defendant
therefore asserts that this court has no jurisdiction of the
53 subject-matter of this action, or the controversies between the complainant and defendant herein.

IV.

This defendant further answering unto said amended bill of complaint, alleges that it is now and at all of the times mentioned in said complaint was the owner, in possession and entitled to the possession of the following-described portion of the Pennsylvania Lode claim, lot No. 172, T. 3 N. R. 7 W., Silver Bow county, Montana, to wit:

Beginning at the northeast corner of lot No. 172, from which corner No. 3 of lot No. 179, the Rarus Lode claim, bears S. 61° 20′ E., 321 feet distant; and running thence N. 88° 15′ W., 133 feet; thence S. 69° 25′ E., 136 feet; thence N. 4° 0′ E., 44 feet to the place of beginning, containing an area of $\frac{7}{10}$ of an acre.

Defendant further alleges that on or about the 24th day of January, 1879, John E. Lloyd, David J. Lloyd, Thomas E. Lloyd, William Harris, Sr., William Harris, Jr., and John H. Davis duly located the Johnstown Lode claim, lot No. 173, T. 3 N., R. 7 W., Silver Bow county, Montana, by compliance with all and singular the requirements of an act of Congress and the local rules, regulations and acts of the Territory of Montana. That said location was so laid along the veins, lode or ledge in said claim that said veins or lode in their course or strike were substantially parallel to the side lines of said claim, and departed from said Johnstown Lode claim through both end lines thereof, and that said lode claim was so located that its end lines as marked upon the ground were parallel to each other. That subsequently thereto such proceedings were had in the United States Land Office that a United States patent was issued to the owners of said Johnstown Lode claim, a copy of which patent is attached to complainant's amended bill of complaint. That the surface area so patented conformed in extent and boundaries to the location thereof theretofore made as above alleged, and that the end lines as described in said patent were and are
54 parallel to each other.

That there was a vein or lode containing valuable metals discovered and located within the boundaries of said claim and that the same had its apex therein, and on its course or strike departed from both end lines of the Johnstown Lode claim as patented.

That the said locators of the said Johnstown Lode claim were at the time said location was made, the owners of the Pennsylvania Lode claim, the greater portion of which is now claimed by the complainant and described in its amended bill of complaint herein.

That on or about the 7th day of March, 1883, the owners of the Johnstown Lode claim and the Pennsylvania Lode claim were the same persons. That the then owners of the said Johnstown and Pennsylvania claims, for a valuable consideration conveyed to the predecessors in interest of this defendant a certain parcel of ground within the lines of the Johnstown claim, which portion is specifically described in the deed of conveyance therefor, made, executed and delivered by said parties to the predecessors in interest of this defendant as follows:

"All the right, title and interest, estate, claim and demand of the said parties of the first part, of, in and to that certain portion, claim and mining right, title and property on that certain ledge, vein, lode or deposit of quartz and other rock in place, containing precious metals of gold, silver and other metals, and situated in the Summit Valley mining district, Silver Bow county, Montana, and described as follows, to wit: Beginning at the southeast corner of lot No. 173, a granite stone 26 x 12 x 6 inches, 20 inches deep, with mound of stone 2½ feet high 4½ feet base alongside the stone and running thence N. 8° 30′ W., 219 feet; thence N. 70° 09′ W., 522 feet, from which corner No. 1, of lot No. 179 bears N. 70° 09′ W., 550 feet distant; thence S. 74° 33′ W., 329 feet; thence S. 25° 40′ W. 235 feet; thence S. 69° 25′ E., 400 feet, thence N. 85° 30′ E., 567 feet to the place of beginning, containing an area of 6 and $\frac{55}{100}$ acres.

All right, title and interest that is now possessed, together
55 with any that may hereafter accrue through application No. 1265, made to the United States Government by the grantors herein for patent for lot No. 173, together with all the dips, spurs and angles, and also all metals, ores, gold, silver and metal-bearing quartz, rock and earth therein, and all the rights, privileges and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed, and also all the estate, right, title, interest, possession, claim and demand whatsoever, of the said parties of the first part of, in and to the premises and every part and parcel thereof."

That the predecessors in interest of this defendant immediately after the purchase entered into the possession of the premises so conveyed as aforesaid, and that thereafter this defendant became the owner thereof and at all of the times herein and in the said amended bill of complaint mentioned has been and now is the owner, in possession and entitled to the possession thereof.

And defendant further alleges that at the time said deed, dated the 7th day of March, 1883, was executed and delivered, the grantors therein were the owners of the Pennsylvania Lode claim and also the owners of the Johnstown Lode claim, and that by said deed the grantors therein and the predecessors in interest of the complainant in this case conveyed to the predecessors in interest of defendant all leads, lodes and ledges, with their dips, spurs and angles, beneath the surface of the Pennsylvania Lode claim, which might have their tops or apices within that parcel of ground conveyed by said deed, and that the conveyance of said veins, lode and ledges beneath the surface of the Pennsylvania Lode claim was made by the predecessors in interest of the complainant wholly without regard to the strike of said veins, leads or ledges, and wholly without regard to whether or not they departed or might depart through any particular line or lines of the Johnstown Lode claim.

That by said conveyance the predecessors in interest of the complainant then and there conveyed to the predecessors in
56 interest of this defendant the same leads, veins and ledges which are now claimed by the complainant in this case and

that ever since said time and down to the commencement of this action this defendant and its predecessors in interest have been and this defendant now is in possession, and the owner of whatever leads, loads, veins or ledges may lie beneath the surface of the Pennsylvania Lode claim and which have their tops or apices within the premises conveyed by said deed, which premises lie inside the Johnstown Lode claim regardless of the fact that they may or may not depart through any particular lines of said Johnstown claim, or as to whether or not they depart through the end lines or side lines thereof.

That subsequently, and after the date of said deed to the predecessors in interest of this defendant, and after the said deed had been recorded in the office of the county clerk and recorder of Deer Lodge county, Montana, the grantors named in said deed conveyed to the predecessors in interest of this complainant all the remainder of their right, title and interest at the time of the conveyance in and to that portion of the Pennsylvania claim now claimed by the complainant. Defendant alleges that by virtue of such conveyance to the predecessors in interest of this complainant this complainant and its predecessors in interest acquired no right, title or interest whatever in or to any of the lodes, leads, veins, ledges or mineral deposits which lie beneath the surface of the Pennsylvania Lode claim, and which have their tops or apices within that parcel of ground conveyed to the predecessors in interest of this defendant by said deed of March 7th, 1883, and which lies within the Johnstown Lode claim, for the reason that at the time the said conveyance was made to the predecessors in interest of said complainant, the grantors in said conveyance were not the owners or in possession or entitled to the possession of any of the leads, lodes, veins, ledges or mineral deposits, with their dips, spurs and angles, beneath the surface of the Pennsylvania Lode claim, which had their tops
57 or apices within the premises conveyed to the predecessors in interest of the defendant as aforesaid, and for the reason that the predecessors in interest of defendant were at the time the owners, in possession and entitled to the possession of the same under said deed of conveyance, and that they and this defendant have been ever since said time so the owners, in possession and entitled to the possession of the same.

Defendant alleges that the said locators of the Johnstown Lode claim, being the owners of the Pennsylvania Lode claim at the time, as hereinbefore stated by their location of the Johnstown Lode claim, represented to the predecessors in interest of this defendant, and to this defendant, that they, the said locators had located the said Johnstown Lode claim in accordance with the requirements of the laws of the United States, and that they had located the same along the veins, and that all veins having their top or apex therein departed on their course or strike through the end lines of the Johnstown Lode claim.

That the complainant is the successor in interest of said locators in a portion of said Johnstown Lode claim, and is also their successor in interest in the Pennsylvania Lode claim. Defendant further

alleges that under and by virtue of said deed of conveyance for said portion of the Johnstown Lode claim hereinbefore mentioned, it is the owner and entitled to all the veins, lodes, ledges and deposits within or having their top or apex within the said portion of the Johnstown Lode claim throughout their entire depth, together with all the dips, spurs and angles, and also all the metals, ores, gold, silver and metal-bearing quartz, rock and earth therein although the same may depart on their course downward from within the lines of that portion of the Johnstown Lode claim and enter beneath the surface of the Pennsylvania Lode claim; and that said complainant by reason of the fact that said Johnstown Lode claim was located by the persons before named, and that said persons were the owners thereof, and of the Pennsylvania Lode claim at the time said
58 above-mentioned deed was executed and delivered to the predecessors in interest of this defendant, and by reason of the execution and delivery of said deed is estopped from denying its right thereto or to any of the veins, lodes, or ledges dipping under the surface of the Pennsylvania claim, but apexing in said premises described in said deed.

This defendant admits that during the time from April first 1895, up to the commencement of this action, but not at any time while the complainant was the owner of the veins or lode in question in this suit, and not wrongfully or unlawfully, that it did enter into the premises described by complainant, to wit, the Pennsylvania Lode claim by means of underground workings, and by stopes and levels, and did extract ore therefrom, to wit, about 72,000 tons and no more, of the value of $50,000 and no more, and converted the same to its own use, as it had a good right to do, and in good faith and believing at the time, as it does now believe that it was and is the owner of and had a right to all of said ores, minerals and metals which it extracted therefrom. And defendant avers that the complainant had at all of the times during which defendant was extracting ore from within the boundary lines of the Pennsylvania Lode claim extended downward vertically, full knowledge thereof, and of the value thereof, and that the complainant admitted during all of said time that the same belonged to the defendant.

Wherefore, defendant says that the complainant is and ought to be estopped from now asserting any right or title to said ores, or maintaining this suit against defendant for extracting the same or for the value thereof.

Defendant further says that during all of said time it was the owner, in possession and entitled to the possession of the above and foregoing described parcel of land within the lines of the Johnstown Lode claim and of all ores, minerals and metals, rights, privileges and appurtenances thereto belonging and all veins, lodes or ledges throughout their entire depth the top or apex of which lie within the surface lines of said portion of the
59 Johnstown Lode claim extended downward vertically, although the said veins, lodes or ledges so far depart from a perpendicular in their course downward as to extend outside the surface lines of the Johnstown Lode claim as located and patented,

extended downward vertically, provided that the right of possession of said defendant to such outside parts of such veins, lodes or ledges be confined to such portions thereof as lie between ver-ical planes drawn downward at the surface one through the easterly end line of said Johnstown Lode claim, and the other through the westerly end line of that portion, owned by the defendant at the point where said veins or lode depart therefrom and so continued in their own direction that said vertical planes will intersect such exterior parts of such veins or lodes; and the defendant alleges that the ores, minerals and metals which it has extracted from within the Pennsylvania Lode claim were extracted by it from a vein, or lode, or ledge, the top or apex of which lies within the surface lines of said Johnstown Lode claim and that portion thereof owned by it, and within planes drawn downward at the surface as aforesaid, and that said vein or veins, lode or ledge on its or their course or strike pass through both end lines of the said Johnstown Lode claim and pass through both end lines of that portion thereof owned by the defendant, and so far depart from a perpendicular in a downward course as to extend outside of the vertical side lines of the said Johnstown Lode claim and to enter beneath the surface of the Pennsylvania Lode claim, and that said vein or veins, lode or ledge and all ores, minerals or metals which the defendant has extracted therefrom were and are the property of defendant, but that none of such ores, minerals or metals were extracted by the defendant from said outside parts of such vein, lode or ledge except from such portions thereof as lie between ver-ical planes drawn downward at the surface as above stated.

And defendant further alleges that it is the owner and entitled to the possession of said vein or lode and all the ores, minerals
60 and metals therein contained throughout the entire depth of the same within the planes of said lines drawn downward at the surface as aforesaid.

And this defendant further alleges that at and prior to the time of the execution and delivery of the deed for said portion of the Johnstown Lode claim now owned by the defendant, there was a controversy existing between the owners of the Pennsylvania Lode claim and the predecessors in interest of this defendant, and that in order to settle said controversy, and for a valuable consideration paid to them by the predecessors in interest of this defendant in said portion of said Johnstown Lode claim the owners of the Pennsylvania Lode claim being then the owners of the Johnstown Lode claim, made, executed and delivered the deed aforesaid to the predecessors in interest of this defendant for said portion of the Johnstown Lode claim and agreed with them that they should thereafter be the owners of all veins, lodes, deposits, and valuable minerals contained in said portion of the Johnstown and in all the dips, spurs, and angles thereof to the utmost depths of the same, even though the same should depart from said portion of the Johnstown Lode claim and enter beneath the surface of the Pennsylvania Lode claim.

And defendant further alleges that ever since said agreement and the execution and delivery of the deed before mentioned, the said

owners of the said Johnstown and Pennsylvania Lode claims, including the complainant herein, have always admitted and recognized said agreement to the full extent as above set forth, up to the time when complainant instituted this suit.

Defendant denies that the complainant is the owner of or entitled to the possession of the vein, or veins, or lode within the lines of the Pennsylvania claim upon which the defendant has entered, and from which it has taken or extracted the ores in question, and asserts that it is the owner thereof and entitled to all the ores, minerals and metals therein contained and that its said
61 ownership therein has been admitted by the complainant and its predecessors in interest under said contract and agreement above mentioned and said deed of conveyance, and that therefore the complainant is and of right should be estopped from now claiming the same or asserting any title thereto.

V.

Defendant further alleges that for the purpose of mining and extracting the ores from said vein or lode beneath the surface of the said Pennsylvania Lode claim and for hoisting the same, it incurred large expense before the same were mined or extracted, in building large hoisting works and appliances, and placing therein large boilers, engines and machinery, to wit, in the sum of $57,500 and for sinking shafts, running cross-cuts, levels and drifts for the purpose of mining and extracting the ores it incurred large expense, to wit, the sum of $118,000. That at and before the time said defendant built said hoisting works, placed machinery therein, sunk said shafts and run said cross-cuts, levels and drifts, and at all the times during which the same was being done, the complainant well knew that the same was being done for the purpose of mining and extracting the said ores and knew that ores were being extracted from within the boundaries of said Pennsylvania claim as claimed by the complainant, and the complainant did not object thereto, but on the contrary admitted that said veins or vein, or lode from which defendant was extracting ores from within the boundary lines of the Pennsylvania claim were the property of defendant, and that said defendant was the owner of said ores and vein or veins or lode and had a good right to mine the same.

And defendant alleges that if it is now enjoined or restrained from extracting ore from said vein or veins or lode it will suffer great and irreparable losss and damage by reason of being deprived thereof and by reason of being obliged to keep the openings therein timbered in the sum of — dollars.

Wherefore, this defendant alleges that said complainant is
62 and should be estopped from alleging any trespass against this defendant, or from claiming any right to the veins, ores or minerals claimed by it, or from asserting that this defendant has no right to enter into said Pennsylvania Lodelclaim underneath the surface thereof and to extract the ores, minerals and metals therefrom to the extent herein claimed by this defendant.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith it is by the said bill charged without this, that there is any other matter, cause or thing in the complainant's said amended bill of complaint contained material or necessary for this defendant to make answer to and not herein and hereby well and sufficiently answered, confessed, traversed and avoided, or denied, is true to the knowledge of this defendant, all of which matters and things this defendant is ready and willing to aver, maintain and prove as this honorable court shall direct, and humbly prays to be hence dismissed with its reasonable costs and expenses in this behalf most wrongfully sustained.

MONTANA ORE PURCHASING CO.,
[CORPORATE SEAL.] By JOHN MACGINNISS, *V. P.*
JOHN J. McHATTON,
Of Butte, Montana, Solicitor and Counsel for Defendant.
CLAYBERG & CORBETT,
Of Butte, Montana, Solicitor and Counsel for Defendant.
R. B. SMITH,
Of Helena, Montana, Solicitor and Counsel for Defendant.
J. F. VAILE,
Of Denver, Colorado, Counsel for the Defendant.

63 THE STATE OF MONTANA, } ss:
County of Silver Bow, }

John MacGinniss being duly sworn on oath deposes and says: That he is an officer of the above-named defendant corporation, Montana Ore Purchasing Company, to wit, the vice-president thereof; that he has heard read the foregoing answer and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

JNO. MACGINNISS.

Subscribed and sworn to before me this 6th day of April, A. D. 1898.

JOHN J. McHATTON, [NOTARIAL SEAL.]
Notary Public in and for Silver Bow County,
State of Montana.

(Endorsed:) Title of court and cause. Separate answer of Montana Ore Purchasing Co., to complainant's amended bill of complaint. Filed and entered, April 7, 1898. Geo. W. Sproule, clerk.

64 And thereafter to wit, on the 29th day of March 1899, a decree was duly signed filed and entered herein dismissing said cause for want of jurisdiction, which said decree is in the words and figures as follows, to wit:

65 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

BOSTON AND MONTANA CONSOLIDATED COPPER and Silver Mining Company, a Corporation, Complainant,
vs.
MONTANA ORE PURCHASING COMPANY, a Corporation; F. Augustus Heinze, and Arthur P. Heinze, Defendants.
} Decree. No. 35

This cause coming on regularly before the court on the — day of March, 1899, to be heard, and the mandate of the United States circuit court of appeals, ninth circuit, being filed and entered upon the minutes herein, now, upon motion of John J. McHatton and Clayberg and Corbett, solicitors and counsel for defendants, and in accordance with the directions of the said mandate,

It is ordered that the amended bill herein be dismissed with costs to the defendants.

And it appearing from the mandate of the said court of appeals that the defendants are entitled to the sum of seven hundred and seventy-three and $\frac{45}{100}$ ($773.45) dollars costs, on the appeal taken herein, which costs have heretofore been taxed and included in said mandate.

It is ordered, adjudged and decreed that said defendants have and recover from the complainant said sum of seven hundred and seventy-three and $\frac{45}{100}$ dollars, costs as aforesaid.

By the court this 29th day of March, 1899.

HIRAM KNOWLES, *Judge.*

Decree. Filed and entered Mar. 29, 1899, Geo. W. Sproule, clerk by Chas. W. Blair, dep. clerk.

66 And thereafter to wit, on the 30th day of March 1899, a bill of exceptions was duly signed settled and allowed herein which is in the words and figures as follows, to wit:

67 In the Circuit Court of the United States, Ninth Circuit, District of Montana, Southern Division.

BOSTON AND MONTANA CONSOLIDATED COPPER and Silver Mining Company, a Corporation, Complainant,
vs.
MONTANA ORE PURCHASING COMPANY, a Corporation; F. Augustus Heinze, and Arthur P. Heinze, Defendants.
} In Equity. No. 35.

This cause came on for hearing upon the application of the defendants, Montana Ore Purchasing Company, F. Augustus Heinze and Arthur P. Heinze, to dismiss this action upon the ground and for the reason that there was no Federal question presented by the

allegations in plaintiff's amended complaint herein, and the defendants' answer thereto, and the said application having been submitted to and duly considered by the court, the court rendered its decision herein sustaining said application to dismiss, upon the ground and for the reason that the court has no jurisdiction of said action.

To the ruling of the court in sustaining said application to dismiss and entering a decree of dismissal therein, the complainant in said action duly excepted and asks the court to sign and seal this its bill of exceptions, which was done accordingly in open court this 29th day of March 1899.

HIRAM KNOWLES, *Judge.*

Bill of exceptions. Filed March 30, 1899, Geo. W. Sproule, clerk by Chas. W. Blair, dep. clerk.

68 And thereafter to wit, on the 30th day of March, 1899, a certificate of question of jurisdiction on appeal was duly signed and filed herein which is in the words and figures as follows, to wit:

69 In the Circuit Court of the United States, Ninth Circuit, District of Montana, Southern Division.

Boston and Montana Consolidated Copper and Silver Mining Company (a Corporation), Complainant, vs. Montana Ore Purchasing Company, a Corporation; F. Augustus Heinze, and Arthur P. Heinze, Defendants.	In Equity. No. 35.

Certificate of question of jurisdiction upon appeal from the circuit court of the United States, ninth circuit, district of Montana, southern division, to the Supreme Court of the United States.

This cause coming on for hearing upon the application of the defendants, Montana Ore Purchasing Company, F. Augustus Heinze and Arthur P. Heinze to dismiss said action on the ground of want of jurisdiction in this court to consider the same, and said application having been submitted to and fully considered by this court, said application to dismiss was sustained, and a decree dismissing the same duly entered by this court for the reason and upon the ground that the court had no jurisdiction of said action, upon the facts alleged in complainant's amended bill of complaint, and the answer of the Montana Ore Purchasing Company, thereto, and said complainant being desirous of taking an appeal from the decree of the court sustaining said application to dismiss, and entering said decree of dismissal, and having this day applied to this court
70 for a certificate as required by law in such cases,

The court hereby certifies to the Supreme Court of the

United States for a decision upon the following question of jurisdiction, which has arisen upon said application to dismiss, whether or not said court had jurisdiction, and whether or not a Federal question is presented in complainant's amended bill of complaint and the answer of the Montana Ore Purchasing Company thereto.

That said allegations in said complainant's amended bill of complaint are as follows, to wit:

71 That your orator is now and at all the times hereinafter mentioned was a corporation organized and existing under and by virtue of the laws of the State of Montana, with its principal place of business at Butte city, in Silver Bow county, in the State of Montana.

That the defendant, Montana Ore Purchasing Company, is now and at the time hereinafter mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of Montana, with its principal place of business at Butte city, in Silver Bow county, in the State of Montana.

I.

That your orator is the owner and entitled to the possession of that portion of the following-described property, known as and called the Pennsylvania Lode mining claim, lot number 172, situated in Summit Valley mining district, Silver Bow county, Montana, which is particularly bounded and described as follows, to wit:

Beginning at corner number one, from which the quarter-section corner on north boundary of section eighteen in township
72 three, north of range seven west of the principal meridian for Montana bears north three degrees fifty-seven minutes west seven hundred and thirteen feet distant, and corner number three of lot number 64, St. Lawrence Lode claim, and corner number two of lot number 126, the Little Ida Lode claim, bears north eighty-three degrees ten minutes east four hundred and forty-nine feet distant; thence, first course, magnetic variation 19 degrees 45 minutes east south 88 degrees 15 minutes east 56 feet, to a point on east end line of lot 147, the Rob Roy Lode claim; for point of intersection of said lots 147 and 172, from which corner number 5 of said lot 147 bears south 11 degrees east two hundred and ninety-six feet distant; one thousand five hundred feet to corner number two; thence, second course, magnetic variation 20 degrees east, south 4 degrees 30 minutes west 564.6 feet to a point on north boundary line of mineral application 722, a placer claim, from which the northwest corner of said mineral application 722, which is also the northeast corner of mineral application 686, a placer claim, bears west 183.9 feet distant; six hundred feet to corner number three; thence, third course, magnetic variation 20 degrees east, north 88 degrees 15 minutes west 181.3 feet to a point on the west boundary line of said mineral application 722, and east boundary line of said mineral application 686, from which the northwest corner of said mineral application 722 and the northeast corner of said mineral application 686 bears north 29.8 feet distant; nine hundred and twenty-

four feet to a point over a tunnel, from which the mouth of
73 said tunnel bears south 58 feet distant; eleven hundred and fifty-six and two-tenths feet to a point on the north boundary line of said mineral application 686, from which the northeast corner of said mineral application 686 bears east 974.4 feet distant; fifteen hundred feet to corner number four, from which the southwest location corner bears south four degrees 30 minutes west 48 feet distant; discovery shaft bears north 70 degrees 30 minutes east 827 feet distant; corner number five of said lot 147 bears north 27 degrees 30 minutes east 344 feet distant and corner number three of lot 146, the Grant Extension lode, bears south 36 degrees 45 minutes west 152 feet distant; thence, fourth course, magnetic variation 20 degrees east north 4 degrees 30 minutes east 325 feet to a point on south side line of said lot 147, for point of intersection of said lots 147 and 172, from which corner number five of said lot 147 bears south 82 degrees 4 minutes east 135 feet distant; six hundred feet to corner number 1, the place of beginning. Expressly excepting and excluding herefrom all that portion of the ground heretofore described, embraced in said mining claim or lot number 147; also mineral applications number 686 and 722; and also all that portion of said Pennsylvania lode; also all veins, lodes or ledges throughout their entire depth, the tops or apexes of which lie inside of such excluded ground. Also excepting and excluding herefrom all that portion of the said above-described Pennsylvania Lode claim described as follows, to wit: Beginning at the northeast corner of lot num-
74 ber 172; and running thence north 88 degrees 15 minutes west 130 feet; thence south 69 degrees 25 minutes east 136 feet; thence north 4 degrees 30 minutes east 44 feet to the place of beginning, and containing an area of $\frac{7}{100}$ of an acre of ground.

That this plaintiff became and was and is the owner of the said premises, in the following manner, to wit:

That on the 18th day of June, 1877, William Harris, Sr., and William Harris, Jr., duly located the said Pennsylvania Lode claim as a quartz lode mining claim.

That on the 13th day of January, 1879, the said William Harris, Sr., and William Harris, Jr., duly conveyed to John E. Lloyd, David J. Lloyd, and Thomas E. Lloyd, by regular deed of conveyance, a one-half undivided interest in and to the said Pennsylvania Lode claim.

That on the 13th day of January, 1879, William Harris, Sr., and William Harris, Jr., duly conveyed to John H. Davis, by regular deed of conveyance, an undivided one-sixth interest in and to the said Pennsylvania Lode claim.

That on the 19th day of May, 1879, the said John H. Davis duly conveyed to William Harris, Sr., by regular deed of conveyance, a one-twelfth undivided interest in and to the said Pennsylvania Lode claim.

That on May 19th, 1879, the said John H. Davis duly conveyed to John Dunstan, by regular deed of conveyance, a one-twelfth undivided interest in and to the said Pennsylvania Lode claim.

75 That on March 13, 1880, David J. Lloyd conveyed to Wm. W. Thomas, by regular deed of conveyance, an undivided one-twelfth interest in and to the said Pennsylvania Lode claim.

That on the 14th day of August, 1880, William Harris, Sr., and William Harris, Jr., conveyed to Thomas Griffith, by regular deed of conveyance, an undivided one-twelfth interest in and to the said Pennsylvania Lode claim.

That on July 6, 1882, Thomas C. Porter and Howell M. Thomas, the duly appointed, qualified and acting administrators of the estate of William W. Thomas, deceased, duly authorized and empowered, conveyed by regular deed of conveyance to John E. Lloyd an undivided one-twelfth interest in and to the said Pennsylvania Lode claim.

That on the 19th day of July, 1882, the said John E. Lloyd, by regular deed of conveyance, conveyed to Jeremiah Griffith an undivided one-twelfth interest in and to the said Pennsylvania Lode claim.

That on the 15th day of August, 1883, the said William E. Harris, Jr., and Anna Harris, his wife, by regular conveyance, conveyed to Thomas Griffith an undivided one-eighth interest in and to the said Pennsylvania Lode claim.

76 That on the 9th day of April, 1886, a United States patent for the said Pennsylvania Lode claim, was duly issued by the United States to William Harris, Sr., William Harris, Jr., John E. Lloyd, David J. Lloyd, Thomas E. Lloyd, Jeremiah Griffith, Thomas Griffith, and John Dunstan.

That on the 28th day of March, 1888, the said Jeremiah Griffith, by regular deed of conveyance, conveyed to Enoch Grim an undivided one-twelfth interest in and to the said Pennsylvania Lode claim.

That on the 31st day of March, 1888, the said John E. Lloyd, Margaret Lloyd, his wife, Jeremiah Griffith, Enoch Grim, John H. Davis and Laura Davis, his wife, Thomas E. Lloyd, John Dunstan and Sarah Dunstan, his wife, William Harris, Sr., and Barbare Harris, his wife, William Harris, Jr., and Anna Harris, his wife, Thomas Griffith, and David J. Lloyd, by John E. Lloyd, his attorney-in-fact, by regular deed of conveyance, conveyed to Thomas Couch all that portion of the said Pennsylvania Lode claim, hereinbefore described as the property of this complainant, excepting a right of way to the Montana railway.

That on the 30th day of November, 1888, by regular deed of conveyance, the said Thomas Couch and Rachel Couch, his wife, conveyed to this complainant, The Boston and Montana Consolidated Copper and Silver Mining Company all that portion of the
77 said Pennsylvania Lode claim, hereinbefore described as the property of this complainant, and that thereby, and by virtue of the said conveyances, this complainant became and was and is the owner of the said premises hereinbefore described.

That on or about the 1st day of April, 1895, the said defendants wrongfully and unlawfully entered upon and into the said premises, hereinbefore described, by underground workings, and by tunnels,

shafts, cross-cuts, and levels, and extracted from the said premises large quantities of valuable ores, to wit, one hundred and fifty thousand tons, more or less, and of the reasonable value of five hundred thousand dollars.

And that ever since the said date the said defendants have continued to extract and mine ores from the said premises belonging to this complainant, and are now mining and extracting ores therefrom, and threaten to continue to do so unless this court shall by its injunction restrain and enjoin the said defendants from so doing.

That the said ground of this complainant is valuable almost exclusively for the mineral therein contained, and that the same is very valuable for the copper and silver and gold ores which are found therein in large quantities, and that it is these ores that the defendants have extracted, and which they are now extracting and mining and threaten to continue to extract in the future.

78 That said ground owned by complainant, hereinbefore described, is of the reasonable value of more than one hundred thousand dollars, and that the said ores which the defendants are extracting, and threaten to extract are of a value in excess of fifty thousand dollars.

The complainant further alleges that it has no means of ascertaining the quantity or value of the ores which the said defendants are extracting or may extract from the said premises owned by this complainant, and that if the defendants are permitted and allowed to continue to extract the said ores from the said premises that it would be altogether uncertain and indefinite as to what amount of ores, or the value thereof, which may be extracted in the future as in the past, and that this complainant will be compelled to rely to a great extent upon the good faith and showing of the defendants as to the amount and value of the ores which they have heretofore and may hereafter extract from the said premises.

That unless the defendants are enjoined and restrained from mining and extracting the ores from the said premises of this complainant, the said portion of the said Pennsylvania Lode claim, this complainant will be required to bring numerous actions for the determination of the damages which it has sustained and will sustain by reason of such trespasses, and that the said trespasses on the part of the said defendants are continuing from time to

79 time, and that this complainant brings this action in order to avoid a multiplicity of actions in the premises.

That by reason of the said trespasses on the part of the said defendants on the premises of this complainant, this complainant has suffered and will continue to suffer great and irreparable injury and damage.

That on or about the 6th day of March, 1897, this complainant brought an action in the circuit court of the United States, ninth circuit, for the district of Montana, southern division, against the said defendants, to recover of the said defendants for the ores extracted from the said portion of the Pennsylvania Lode claim, hereinbefore described, and that the said action is now pending in this court.

And, as showing the jurisdiction of this court to determine the said matters set forth in the said action, this complainant alleges:

That the determination of the said controversy between the said complainant and the said defendants involves the construction of title twenty-three, chapter VI, of the Revised Statutes of the United States, concerning mines and mineral lands, in this, to wit:

That the said Pennsylvania Lode claim, owned and claimed by this complainant, as hereinbefore alleged, is a mining claim duly located under the provisions of the statutes of the United
80 States relative to the appropriation of mineral lands, and that the same has been patented as a mining claim under the provisions of the said statutes.

That the said defendants own or claim to own a portion of that certain quartz lode claim known as and called the Rarus Lode claim, lot number 179; and also a portion of that certain other quartz lode mining claim, known as and called the Johnstown Lode claim, lot number 173; and also a portion of the Little Ida Lode mining claim, lot number 126; and which said claims lie north of and partially adjoining and near to the said Pennsylvania Lode claim on the north. The complainant is not acquainted with the exact metes and bounds of the said ground owned or claimed by the defendants.

That the said Rarus Lode claim, Johnstown Lode claim, and Little Ida Lode claim are mineral claims, located under the laws of the United States relative to the appropriation and location of mineral lands, and plaintiff is informed and believes, and therefore alleges that the said claims, or some of them, have been patented by the United States to various parties, and that such patents were issued under and by virtue of the statutes of the United States relative to the patenting of mineral lands upon the public domain.

That as plaintiff is informed and believes, and therefore
81 alleges, the said defendants claimed the right to enter upon the premises of this complainant, to wit, that portion of the Pennsylvania Lode claim above described, by reason of the fact that certain veins, owned or claimed by the defendants or in their possession, have their tops or apexes within the ground owned or claimed as a portion of the Rarus Lode claim, a portion of the Johnstown Lode claim, or a portion of the Little Ida Lode claim, and defendants assert the right to follow such veins on their downward courses or dips, although the same so far depart from a perpendicular as to depart from the ground owned or claimed by the defendants, and enter the premises owned and claimed by this complainant, to wit, that portion of the Pennsylvania Lode claim hereinbefore described.

But complainant denies and disputes the fact that the said veins, upon which the said defendants have mined within the lines of the Pennsylvania Lode claim, even if such veins have their apices in defendants' ground which complainant does not admit are such veins as can be followed on their dip beyond the lines of the defendants' possessions, and into the ground or premises of this plaintiff; but alleges the facts to be that the said veins are broken and

intersected by faults in such a manner that the same cannot be traced or followed from the ground of the defendants into the said Pennsylvania Lode claim, and that therefore the said defendants have no right to enter upon the ground of this plaintiff, to wit, the said Pennsylvania Lode claim, for the purpose of extracting ores therefrom, by reason of their ownership of the apexes of any veins within their ground.

82 And this complainant further shows unto the court, that the veins, upon which the defendants have been extracting ores within the premises of this complainant, if they or any of them have their apices on defendants' ground, which complainant does not admit do not in their course or strike depart from the end lines of the defendants' claims or possessions, but that the same depart from the side lines of such claims in such a manner as to prohibit the said defendants from following the same beyond the side lines of their own possessions or claims into plaintiff's portion of said Pennsylvania Lode claim.

That there are several veins which the defendants claim the right to follow on their dips beyond the side lines and into the ground of this complainant, the said Pennsylvania Lode claim, but that neither of the said veins in their courses or strikes depart from the end lines of the said claims or possessions of the defendants, if they have their apices within the defendants' premises at all but complainant alleges that the ground claimed by the defendants was not so located or situated as to have any end lines whatever, as provided by the statutes of the United States in such cases, and that in consequence of such failure upon the part of the locator or locators of the ground or claims, owned or claimed by the defendants, to mark the same with end lines parallel, or to locate the same along the veins, but on the contrary having located the same across the veins, the said defendants have no extralateral rights in or to any of the veins in their said ground, and are not entitled to follow the same into or upon the ground of this plaintiff, the said portion of the Pennsylvania Lode claim.

83 And your orator further shows to your honors that a patent was issued by the United States to Stanislaus E. Hirbour and others to that certain quartz lode claim known as and called the Rarus hereinbefore referred to, a copy of which patent is hereto attached, marked Exhibit "A" and made a part of this bill.

And your orator further shows that a patent has been granted by the United States to William Harris, Sr. and others for that certain quartz claim, known as and called the Johnstown claim, a copy of which patent is hereto attached, marked Exhibit "B" and made a part of this bill.

And as showing to your honors that the questions involved in this controversy are questions arising under the statutes of the United States and involving the construction thereof, your orator shows and alleges that the said defendants herein claim to own a portion of the ground patented under both the said Johnstown and Rarus patents and that by virtue of the said Rarus patent, they, the said defendants, have acquired 1318 linear feet of what is

designated and called the Rarus lode and it is contended by the said defendants that under and by virtue of the said Rarus patent they and their predecessors in interest were granted 1318 linear feet to the Rarus lode extending from what is known as the east end line of the Rarus claim to an imaginary line or projected line of the Rarus location.

And your orator further shows to your honors that the surface ground patented to the predecessors in interest of defendant to the Rarus Lode claim do not include to exceed more than about three hundred feet of said Rarus lode and shown in yellow shading on the map attached to the Rarus patent but that notwithstanding the fact that the surface ground granted by the said Rarus patent did not cover or extend over the said Rarus lode the defendants contends and claim that the said patent of the Rarus claim
84 granted to them and their predecessors in interest the said Rarus lode beyond the surface ground granted by the Rarus patent and to the full extent thereof of 1318 linear feet and also contend and claim that by reason of the ownership of the said lode for the length aforesaid, and that by reason of the fact that the same passes through the east end line of the Rarus claim, as patented and the west end line of the original location of the said claim, that they are entitled to follow said veins on their course or dip into the earth and without the line of the Rarus claim, both as originally located and as patented.

Your orator further shows that a large portion of the ground which it is claimed by the defendant was originally included within the location of the Rarus claim, has been patented under the said Johnstown patent, hereinbefore referred to and as shown by the portion shaded in yellow on the plat attached to the said Johnstown patent.

That notwithstanding that a portion of the Rarus location was patented under the Johnstown claim, the defendants contend and claim that only the surface ground of the Johnstown claim was patented to the patentees therein named and that all veins lying within the original location lines of the Rarus claim were patented to claimants under the Rarus claim and that defendants are entitled to claim the said veins extending through the Johnstown patent under and by virtue of the Rarus patent and that its extralateral right should be determined by the Rarus and not by the Johnstown patent.

Your orator further shows to your honors that it disputes each and every one of the claims made by defendants, relative to the construction of said several patents, and claims that all veins, whose
85 apexes lie within the Johnstown patent must be governed and regulated in extralateral rights, if any they have, under the Johnstown patent, and not under and by virtue of the Rarus patent.

And your orator further shows to your honors that the defendants claim that if they have no right to follow the veins within the lines of the original Rarus location, by virtue of the said Rarus patent, that they have a right to follow the same under and by virtue of

the Johnstown patent or the Johnstown patent and Rarus patent combined, under and beneath that portion of the Pennsylvania Lode claim belonging to this complainant; but opposed to this contention the complainant contends and insists that the defendants have no right to follow any vein, having its apex either within the Johnstown or Rarus patent, under any circumstances into or under the Pennsylvania Lode claim, at any point east of the intersection of the south side line of the Johnstown patent with the south side line of the original Rarus location.

And your orator further shows to your honors that the said defendants contend and claim that the complainant cannot under any circumstances obtain any relief for ores extracted within that portion of the premises owned by it, without first showing that the apices of the veins from which the ores were extracted, are within the surface lines of the ground owned and claimed by the complainant, whereas your orator claims that *prima facie that* it is the owner of all ores found within its boundary-s extended downward into the earth, until it has been shown that some other person or company has some right thereto by reason of ownership of the apex of the vein within some other claim.

And your orator further shows to your honors that it is claimed by the defendants that the apex of the veins from which the ores in question were extracted, is divided in that a portion thereof is claimed by the defendants as upon the Rarus Lode claim and a portion thereof upon the Johnstown Lode claim and a por-
86 tion thereof upon the Pennsylvania Lode claim. And defendants claim that by reason of the said divided apex that they may claim the right to follow the said vein beneath the surface and without the line of the Rarus and Johnstown claims, under and by virtue of either or both of the said claims, at their election.

Complainant alleges that if any such vein as is claimed by the defendants exists that they have no extralateral rights, by reason of the fact that the same has a divided apex.

Wherefore, your orator shows to your honors that there *is* involved in the matters in controversy, between your orator and the said defendants, the numerous questions aforesaid, involving the construction of the statutes of the United States, relative to locating, purchasing and patenting of mineral lands and the construction of the statutes, relative to the right of one claimant to follow veins down to and into the premises of another, under the circumstances and situation of the parties as hereinbefore set out, and also the construction of the said statutes in relation to patenting of claims and whether the vein can be patented to one person and the surface to another, and to the right of the Land Department to segregate the surface from the mineral in the ground, granting one to one person and the other to another, and as to whether said action is authorized under and by virtue of said statutes; and also as to whether when an apex of a vein is divided upon the surface, part being within the premises granted in one patent and a part within another, as to

what, if any extralateral rights, are granted under such circumstances to either party.

87 That said allegations in said answer of the Montana Ore Purchasing Company, to said amended bill of complaint are as follows: to wit:

That it admits that the complainant is a corporation organized and existing under and by virtue of the laws of the State of Montana, with its principal place of business at Butte city, Silver Bow county in said State.

That this defendant is now and at all times mentioned in said complaint was a corporation duly organized and existing under and by virtue of the laws of the State of Montana, having its principal place of business at Butte city, Silver Bow county, in said State.

Admits that the complainant is the owner of the surface ground of that portion of the Pennsylvania Lode claim described in its complaint, but denies that the complainant is the owner of or entitled to the lode or veins or ore bodies upon which the defendants has entered and from which it has extracted the ores in question in this case, and alleges that defendant is the owner of said veins or lode and ore bodies. Admits that complainant acquired title to the Pennsylvania Lode claim by virtue of the several deeds of conveyance set out in its amended bill of complaint.

II.

Denies that on or about the first day of April, 1895, or at any other time or at all the defendant wrongfully or unlawfully entered upon or into the premises of the complainant, to wit, the Pennsylvania Lode claim as described by it, by underground workings, or tunnels, or shafts, or cross-cuts, or levels or otherwise or at all, or extracted from the said premises of complainant large or any quantities of valuable ores, or any ores to the amount of one hundred and fifty thousand (150,000) tons more or less, or to any amount whatever, or of the value of five hundred thousand dollars, ($500,000) more or less or of any value whatever.

88 And denies that ever since said time or at all defendant has continued to mine or extract ores from said premises belonging to the complainant or is now extracting ores therefrom or threatening so to do, or that it ever or at all mined or extracted ores from the said premises belonging to the complainant, or threatened so to do, as alleged in complainant's complaint or otherwise or at all, and denies that it will do so unless restrained by the injunction of this court.

Denies that complainant's ground is valuable for ores, as alleged in complainant's complaint and denies that it is these ores or any ores belonging to the complainant that defendant has extracted or is extracting or is threatening to extract therefrom.

Denies that the ground owned by the complainant is of the reasonable value of more than $100,000, and denies that the ores which the defendant is extracting or is threatening to extract are of the value in excess of $50,000 or that the same are of any value to the

complainant, or that complainant has any right, title or interest therein or thereto. Denies that the complainant has no means of ascertaining the quantity or value of the ores which the defendant is extracting or may extract from the said premises; and denies that if the defendant is permitted or allowed to continue to extract said ores that it would be uncertain and indefinite as to what amount of ores or the value thereof might be extracted in the future by the defendant; and denies that the complainant would be compelled to rely to a great extent or to any extent upon the good faith or showing of the defendant as to the amount or value of the ores which it has heretofore extracted, or may hereafter extract from said premises.

Denies that unless the defendant is enjoined or restrained from mining or extracting ores from said premises, that the
89 complainant will be required to bring numerous actions or any actions for the determination of the damages which it has sustained or will sustain by reason of the extraction of said ores by the defendant; and denies that complainant has sustained or will sustain any damages on account thereof. And denies that defendant is trespassing upon the premises of complainant or that any trespasses on the part of the defendant are continuing from time to time; and denies that defendant is intending to trespass upon the premises or rights of the complainant.

And defendant further denies that by reason of the trespasses upon its part on the premises of the complainant, complainant has suffered or will continue to suffer great or irreparable injury or damage, or will suffer any injury or damage at all on account of any act of the defendant; and denies that this defendant is trespassing upon the property of the complainant or threatening so to do.

III.

Defendant denies that the determination of the controversy between the complainant and defendant involves a construction of title 23, chapter 6, of the Revised Statutes of the United States, concerning mines and mineral lands in the manner stated in complainant's amended bill of complaint and denies that said controversy involves the construction of the same in any manner or at all, and denies that the controversy between the complainant and defendant involves the construction of any statute of the United States whatever.

Defendant admits that the Pennsylvania Lode claim claimed in part by complainant is a mining claim located under the provisions of the statutes of the United States relative to the appropriation of mineral lands and that the same has been patented as a mining claim.

90 Admits that the Rarus Lode claim and the Johnstown Lode claim are mineral claims located under the laws of the United States, relative to the appropriation and location of mineral lands and that the same have been patented under the laws of the United States.

Admits that the defendant owns a portion of that certain lode mining claim known as and called the Rarus Lode claim, lot No. 179, T. 3 N. R. 7 W. in Silver Bow county, Montana, and also a parcel of ground with all the veins, lodes and ledges having their top or apex therein with all their dips, spurs and angles, which parcel of ground lies within the lines of the Johnstown Lode claim lot No. 173, T. 3 N. R. 7 W. in Silver Bow county, Montana. And admits that said Rarus and Johnstown Lode claims lie north of and partly adjoining and near to the Pennsylvania Lode claim.

Denies that the defendant owns any portion of the Little Ida Lode mining claim, lot No. 126.

Defendant alleges that it is the owner of said parcel of ground as above admitted, within the Johnstown Lode claim and as hereinafter described and also that it is the owner of that portion of the Pennsylvania Lode claim hereinafter described. Defendant admits that it claims the right to enter upon the premises of complainant, to wit, that portion of the Pennsylvania Lode claim described in its amended bill of complaint, by reason of the fact that certain veins owned and claimed by the defendant, and in its possession have their top or apices within the Johnstown Lode claim, lot No. 173, and that portion thereof owned by the defendant and that the defendant asserts the right to follow such veins on their downward course or dip, although the same so far depart from a perpindicular as to depart from the said Johnstown Lode claim, and from that portion thereof owned by the defendant, and enter the premises owned and claimed by the complainant, to wit, that portion of the
91 Pennsylvania Lode claim, described in its amended bill of complaint. But defendant denies that it claims the right to enter upon the premises of the complainant, to wit, that portion of the Pennsylvania Lode claim described in its amended bill of complaint, by reason of the fact that any veins owned or claimed by defendant or in its possession have their top or apices within the Rarus Lode claim, or in that portion thereof owned by defendant, or by reason of the fact that the same have their top or apices within the Little Ida Lode claim or any portion thereof and denies that it asserts the right or any right to follow such veins on their downward course or dip, although the same so far depart from a perpendicular as to depart from said Rarus Lode claim, and to enter the premises claimed by the complainant; and denies that it asserts or claims the right to enter the premises of the complainant by reason of the fact that any veins owned or claimed by defendant have their top or apices within that portion of the Johnstown Lode claim owned by the defendant, and that it asserts the right to follow such veins on their downward coruse or dip although the same so far depart from a perpindicular as to depart from said Johnstown Lode claim, and from the portions thereof owned by defendant, and to enter the premises of complainant.

And defendant alleges that the vein or lode upon which it has mined within the lines of the Pennsylvania Lode claim and underneath the surface thereof has its top or apex within the Johnstown Lode claim and that portion thereof owned by the defendant. De-

fendant denies that said veins or lode upon which it has mined within the lines of the Pennsylvania Lode claim are not such veins or is not such a lode as can be followed on their or its course downward or dip beyond the lines of defendant's possessions, to wit, that portion of the Johnstown Lode claim owned by it, into the
92 ground or premises of complainant; and denies that said veins or lode are intersected or broken by faults in such manner that the same cannot be followed or traced from the ground of the defendant, to wit that portion of the Johnstown Lode claim owned by it into the Pennsylvania Lode claim, and denies that therefore, or for any other reason the defendant has not the right to enter upon the ground of complainant for the purpose of extracting ores from said vein or lode by reason of its ownership of the apex of the same within its ground the said portion of the Johnstown Lode claim.

Defendant alleges that the veins or lode upon which it has been mining within the Pennsylvania Lode claim and underneath the surface thereof have their top or apex within the lines of the Johnstown Lode claim as located and patented for the entire length of said claim, and running nearly parallel with the side lines thereof, and that the same pass on their or its strike through the end lines of the said Johnstown Lode claim as located and patented and that said end lines are parallel.

And defendant further alleges that the veins or lode upon which it has mined within the Pennsylvania Lode claim have their top or apex within that portion of the Johnstown Lode claim, owned by it, and that the same can be followed and have been followed continuously on or on the dip or downward course from the top or apex within the boundary lines of the Johnstown Lode claim, and the boundary lines of that portion thereof owned by defendant into the ground owned or claimed by complainant to wit, the Pennsylvania Lode claim. Defendant denies that the veins or lode from which it has been extracting ores within the premises of complainant do not on their or its course or strike depart from the end lines of defendant's claim, or possession and denies that the same de-
93 part from the side lines thereof in such a manner as to prohibit the defendant from following the same beyond the side lines of its own possessions, to wit, that portion of the Johnstown Lode claim, owned by it, into complainant's portion of the Pennsylvania Lode claim and denies that said veins or lode depart from the side lines of defendant's said possession or portion of the Johnstown Lode claim, in any manner or at all, and denies that they or it enter the Pennsylvania Lode claim in any other manner than upon the dip or downward course on a departure from the perpendicular through the side line of said Johnstown Lode claim, and of that portion thereof owned by the defendant.

Defendant admits that there are one or more veins or a lode which the defendant claims the right to follow on the dip beyond the side lines of the Johnstown Lode claim, and that portion thereof owned by the defendant, into the ground of the complainant, the Pennsylvania Lode claim; and denies that any of said veins or said

lode in their or its course or strike depart from the side lines of the said Johnstown Lode claim or the portion thereof owned by the defendant, but alleges the fact to be that the same on the course or strike depart from the end lines of the said Johnstown Lode claim as located and patented.

Defendant denies that said ground claimed by the defendand, to wit, that portion of the Johnstown Lode claim hereinafter described was not so located or situated as to have any end lines whatever; and denies that the said locator or locators of the ground owned by this defendant did mark the same with end lines not parallel, or did, locate the same across said vein or lode and denies that the said Johnstown Lode claim was not so located or situated as to have any end lines whatever, as provided by the statutes of the United States, in such cases; and denies that in consequence of the failure on the part of the locator or locators of the said Johnstown Lode
94 claim and the said portion thereof claimed by defendant to mark the same with end lines parallel, or to locate the same along the veins or vein or for any other reason the defendant has no extralateral rights in or to any of the veins in its said ground, to wit, the said portion of the Johnstown Lode claim or has not the right to follow the same into or upon the ground of the complainant. And defendant denies that the locator or locators of the said Johnstown Lode claim located the same across the veins or lode, but alleges that the same was located along the vein or lode, as required by the statutes of the United States, and that the same had and has parallel end lines through which the veins and lodes having their tops or apex therein pass on their course or strike.

Defendant admits that a patent was issued by the United States to Stanisla-s E. Hirbour, and others for that certain quartz lode mining claim, known as and called the Rarus; and also that a patent has been issued granted by the United States to William Harris Sr. and others for that certain quartz lode mining claim known as and called the Johnstown Lode claim (a copy of which patent is attached to complainant's amended bill of complaint).

And the defendant as showing to your honors that the questions involved in this case are not questions arising under the statutes of the United States, or involving the construction thereof, alleges that it does not claim to own a portion of the ground patented under both the Rarus and Johnstown patents, or that it claims in this action that by virtue of said Rarus patent it has acquired 1318 linear feet of what is designated or called the Rarus lode; and denies that it is contended in this action by the defendant that under and by virtue of said Rarus patent it or its predecessors in interest were granted 1318 linear feet to the Rarus lode extending from
95 what is known as the east end line of the Rarus claim to an imaginary of projected line of the Rarus location.

Defendant alleges that it claims to own and does own whatever rights were granted under the patent for the Rarus Lode claim issued by the United States, but that it does not assert any title in this action under said patent, as against the complainant, but relies

upon its ownership of that portion of the Johnstown and Pennsylvania Lode claims hereinafter described.

Defendant admits that the surface ground granted to the predecessors in interest of the defendant in the Rarus Lode claim is as shown by the yellow shading on the map attached to the Rarus patent, but defendant denies that it contends in this action or claims that the patent for the Rarus Lode claim granted to it or its predecessors in interest the Rarus lode beyond the surface ground granted by the Rarus patent or to the full extent thereof of 1318 linear feet and denies that it contends or claims in this action that by reason of the ownership of said lode for the length aforesaid, or by reason of the fact that the same passes through the east end line of the original location of the said claim, that it is entitled to follow said veins on their course or dip into the earth without the lines of the Rarus Lode claim, either as originally located or as patented.

And defendant alleges that in this action it makes no claim of any right under the Rarus patent to enter upon the veins within the ground claimed or owned by the complainant but that it asserts its right to do so by reason of its ownership of a portion of the Johnstown Lode claim, and the fact that the top or apices of the veins or lode in question are within said portion of the Johnstown Lode claim.

Defendant admits that a large portion of the ground which was originally included within the location of the Rarus claim
96 has been patented under the said Johnstown patent and defendant denies that in this action it contends or claims that only the surface ground of the Johnstown claim was patented to the patentees named therein or that all or any veins lying within the original location lines of the Rarus claim were patented to the claimant under the Rarus claim; and denies that it claims or contends that it is entitled to claim the veins extending through the Johnstown patent under or by virtue of the Rarus patent, or that its extralateral rights should be determined by the Rarus patent, and not by the Johnstown patent, but defendant alleges that it contends and claims in this action and in so far as this controversy between complainant and defendant is concerned that its extralateral rights to the veins in question should be determined by its ownership of that parcel of ground now included within the Johnstown claim, and not by the Rarus, for the reason that said vein- or lode- have their top or apex within the said parcel of ground owned by the defendant.

Defendant denies that it makes any claim in this action that if it has no right to follow the veins within the lines of the original Rarus location by virtue of said Rarus patent, that it has a right to follow the same under and by virtue of the Johnstown patent, or of the Johnstown and Rarus patents combined, under and beneath that portion of the Pennsylvania Lode claim belonging to the complainant; and defendant asserts that it does not rely upon any combination of the Johnstown and Rarus patents in this action, but relies upon its ownership of said parcel of ground conveyed to its

predecessors by the owners of the Johnstown claim, and the Johnstown patent.

Defendant denies that it contends or claims that the complainant cannot under any circumstances obtain any relief for the ores extracted within that part of the premises owned by complainant, without first showing that the apex of the vein or veins from
97 which the ores were extracted are within the surface lines of the ground owned and claimed by the complainant. And defendant alleges that its only contention upon this point in the case is that *that* the complainant cannot recover for any of the ores extracted by defendant from within that portion of the premises owned by complainant, for the reason that the top or apex of the vein or lode from which the ores have been extracted is within that parcel of ground owned by defendant, and lying within the lines of the Johnstown claim, and that it is the owner thereof by virtue of said deed of conveyance; and further that the same depart on the strike through the end lines of the Johnstown Lode claim and that the same are therefore outside of the ground owned or claimed by the defendant and that defendant is therefore the owner of the vein or veins or lode throughout the entire depth of the same to the extent that the apex or top of the same is within the ground owned by defendant, and outside of the ground owned and claimed by the complainant.

And defendant denies that it is claimed by it that the apex of the veins from which the ores in question were extracted is divided in that the defendant claims that a portion thereof is upon the Rarus Lode claim and a portion thereof is upon Johnstown Lode claim, and a portion thereof upon the Pennsylvania Lode claim, and defendant denies that the apex of the vein or lode is divided at all or that it claims or asserts in this action that the same is divided; but defendant avers that it claims that the vein or veins or lode from which the ore in question has been extracted have or has their or its apex within the Johnstown Lode claim, and that the same passes through the end lines thereof and defendant alleges that the apex of the same is within that portion thereof owned by it.

And defendant alleges that it does not claim that by reason of a divided apex it may claim the right to follow the said vein or veins or lode beneath the surface and without the lines of the Rarus
98 or Johnstown Lode claims under or by virtue of either or both of said claims at its election, or otherwise, and defendant does not claim that by reason of a divided apex of the vein or veins or lode in question that it has a right to follow the same beneath the surface and without the lines of the Johnstown claim.

And defendant states that if there is any vein having its top or apex within the Johnstown Lode claim or that portion thereof owned by defendant and which departs on its strike from the Johnstown Lode claim in such manner as to have a divided apex, that is to say a portion of the apex within the Johnstown Lode claim and a portion outside thereof and on the Rarus and Pennsylvania claims that it does not claim the right to follow the same beneath the surface and without the lines of the Johnstown claim, under and by virtue

of either or both of the Rarus or Johnston claims, or at all, and that it does not claim the right to follow the same under the Johnstown claim or patent therefor downward at any point beyond where the entire apex of the vein or lode is within the Johnstown claim, and that portion thereof owned by defendant. And defendant therefore shows to your honors that there is not involved in the matters in controversy between the complainant and defendant any questions involving the construction of the statutes of the United States, relative to locating, purchasing or patenting mineral lands, or any other statutes of the United States, or any construction of such statutes relative to the right of one claimant to follow veins down to and into the premises of another, or any construction of said statutes in relation to the patenting of claims, or whether the vein can be patented to one person and the surface to another or the right of the land office to segregate the surface from the mineral in the ground, or the right to grant one to one person and the other to another or as to whether said action is authorized under or by virtue of the statutes, or as to whether when the apex of a vein is divided
99 upon the surface part being within the premises granted in one patent and a part within another, what, if any, extra-lateral rights are granted under such circumstances to either party.

As there is no controversy between the complainant and defendant in this action upon any of the matters or things suggested or stated by the complainant in its amended bill of complaint, for the purpose of showing that this court has jurisdiction, defendant therefore asserts that this court has no jurisdiction of the subject-matter of this action or the controversies between the complainant and defendant herein."

The court further certifies that upon the said amended bill of complaint and the said answer thereto, this court sustained said application to dismiss and entered a decree of dismissal in accordance therewith, holding that a Federal question was not presented by said allegations and that in consequence thereof there was no juri-diction in this court in said action.

The court further certifies that the amount involved in said controversy as shown by said amended bill of complaint was in excess of two thousand dollars, exclusive of interest and costs.

Done this 30 day of March, 1899.

HIRAM KNOWLES,
Judge of said Court.

Endorsed: (Title of court and cause.) Certificate of question of jurisdiction on appeal. Filed March 30, 1899. Geo. W. Sproule, clerk by Chas. W. Blair, dep. clerk.

100 And thereafter to wit, on the 16th day of March 1901, complainant files its assignment of errors herein in the words and figures as follows, to wit:

101 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER Mining Company, Complainant,
vs.
MONTANA ORE PURCHASING COMPANY, F. AUGUSTUS HEINZE, and Arthur P. Heinze, Defendants.

Assignment of Errors.

Comes now the complainant in the above-entitled cause and assigns errors in the decision and decree of the circuit court in the above-entitled cause, as follows:

I.

In dismissing the said action and entering the final decree in favor of the defendants for its costs against the complainant the court erred.

II.

The court erred in holding that it had no jurisdiction of the subject-matter and parties in the above-entitled action and in dismissing the complainant's amended bill upon motion of the defendants.

In order that the foregoing assignment of errors may be and appear of record, the complainant presents the same to the court and prays that such disposition be made thereof as in accordance with the law and statutes of the United States in such cases made and provided, and the complainant prays a reversal of the decretal order and decree of dismissal made and entered by said court.

JOHN F. FORBIS AND
L. O. EVANS,
Of Butte, Montana, Solicitors for Complainant.

Service of the foregoing by copy is hereby acknowledged
102 this 15th day of March, 1901.

McHATTON AND COTTER,
Solicitors and of Counsel for Defendant.

Endorsed: (Title of court and cause.) Assignment of errors. Filed and entered March 16th, 1901. Geo. W. Sproule, clerk.

And thereafter, to wit, on the 16th day of March, 1901, the complainant filed its petition on appeal herein which is in the words and figures as follows, to wit:

103 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER Mining Company, Complainant,
vs.
MONTANA ORE PURCHASING COMPANY, F. AUGUSTUS Heinze, and Arthur P. Heinze, Defendants.
} No. 35.

Petition on Appeal.

To the Honorable Hiram Knowles, district judge and one of the judges of the above-named court, presiding therein:

The above-named complainant, in the above-entitled cause, Boston and Montana Consolidated Copper and Silver Mining Company, conceiving itself aggrieved by the order and decree made and entered by the above-named court in the above-entitled cause, under date of March 29, 1899, wherein and whereby among other things, it was and is ordered and decreed that this action be dismissed for the reason that the court has no jurisdiction of the subject-matter or the parties to this action and that the defendant- have and recover of the complainant *its* costs of suit, and do hereby appeal to the Supreme Court of the United States from said decree, and plaintiff prays that this its petition for its said appeal may be allowed and that the transcript of record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated this 15th day of March 1901.

JOHN F. FORBIS &
L. O. EVANS.
Of Butte, Montana, Solicitors for Boston and Montana Consolidated Copper and Silver Mining Company, Complainant.

104 Service of the foregoing by copy is hereby acknowledged this 15th day of March, 1901.

McHATTON AND COTTER,
Solicitors and of Counsel for Defendants.

Endorsed: (Title of court and cause.) Petition on appeal. Filed and entered March 16, 1901, Geo. W. Sproule, clerk.

And thereafter, to wit, on the 16th day of March 1901 an order allowing appeal herein was duly made and entered in the words and figures as follows, to wit:

105 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER Mining Company, Complainant,
vs.
MONTANA ORE PURCHASING COMPANY, F. AUGUSTUS Heinze, and Arthur P. Heinze, Defendants.
No. 35.

Order Allowing Appeal.

At a stated term, to wit, the February term, A. D. 1901, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the district of Montana, held at the court-room in the city of Butte, county of Silver Bow, on the 16th day of March, 1901.

Present: Honorable Hiram Knowles, United States district judge.

On motion of Forbis and Evans, solicitors and of counsel for the complainant, it is ordered that an appeal to the Supreme Court of the United States from the final decree heretofore filed and entered herein, be and the same is hereby allowed, and that the certified transcript of the record, testimony, exhibits, stipulations and all proceedings herein, be forthwith transmitted to the Supreme Court of the United States. It is further ordered that the bond on appeal be fixed at the sum of five hundred dollars, as a bond for costs and damages on appeal.

Dated the 16th day of March, 1901.

HIRAM KNOWLES,
District Judge.

Endorsed: (Title of court and cause.) Order allowing appeal. Filed and entered March 16, 1901. Geo. W. Sproule, clerk.

106 And thereafter, to wit, on the 16th day of March 1901, a bond on appeal was duly approved and filed herein which is in the words and figures as follows, to wit:

107 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER Mining Company, Complainant,
vs
MONTANA ORE PURCHASING COMPANY, F. AUGUSTUS HEINZE, and Arthur P. Heinze, Defendants.
No. 35.

Bond.

Know all men by these presents: that we, the Boston and Montana Consolidated Copper and Silver Mining Company, a corporation, as principal, and Alex J. Johnston and J. K. Heslet as sureties,

are held and firmly bound unto the Montana Ore Purchasing Company, F. Augustus Heinze and Arthur P. Heinze, in the full and just sum of five hundred dollars, to be paid to the said Montana Ore Purchasing Company, F. Augustus Heinze and Arthur P. Heinze their attorneys, executors, administrators, or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally firmly by these presents.

Sealed with our seals and dated this 15th day of March in the year of our Lord one thousand nine hundred and one.

Whereas, lately at a session of the circuit court of the United States, for the ninth circuit, district of Montana in a suit pending in said court, between the said Boston and Montana Consolidated Copper and Silver Mining Company, complainant and The Montana Ore Purchasing Company, F. Augustus Heinze and Arthur P. Heinze respondents, a decree was rendered against the said Boston and Montana Consolidated Copper and Silver Mining Com-
108 pany, and the said company having obtained from said court an order allowing an appeal to the Supreme Court of the United States, to reverse the decree of the aforesaid suit, and a citation directed to the said Montana Ore Purchasing Company, F. Augustus Heinze and Arthur P. Heinze is about to be issued citing and admonishing them to be and appear at the Supreme Court of the United States to be holden at the city of Washington.

Now the condition of the above obligation is such that if the said Boston and Montana Consolidated Copper and Silver Mining Company, shall prosecute its said appeal to effect, and shall answer all damages and costs that may be awarded against it, if it fail to make its plea good, then the above obligation to be void; otherwise to be in full force and effect.

ALEX J. JOHNSTON.
J. K. HESLET.

Sufficiency of sureties on the foregoing bond approved this 16th day of March 1901.

HIRAM KNOWLES, *Judge.*

Bond on appeal. Filed and entered Mar. 16, 1901. Geo. W. Sproule, clerk.

And thereafter, to wit, on the 16th day of March 1901 a citation was duly issued, served and filed herein which is hereto annexed and is as follows.

109 *Citation.*

The President of the United States to the Montana Ore Purchasing Company, F. Augustus Heinze and Arthur P. Heinze, and John J. McHatton, their attorney, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, within sixty days from the date of this writ, pursuant to an appeal filed in the clerk's office of the circuit court of the United States, for the district of Montana, wherein The Boston and Montana Consolidated Copper and Silver Mining Company is the plaintiff, and you are the defendants in error, to show cause, if any there be, why the judgment in the said appeal mentioned should not be corrected and speedy justice should not be done the parties in that behalf.

Witness the Honorable Hiram Knowles, judge of the district court of the United States of America, district of Montana, this 16 day of March, A. D. 1901, and of the Independence of the United States the one hundred and twenty-fifth.

HIRAM KNOWLES,
United States District Judge, Presiding in the Circuit Court.

Attest:

{Seal United States Circuit Court, District of Montana, Southern Division, 1892.}

GEO. W. SPROULE, *Clerk.*

Due service of the foregoing citation on appeal, admitted by copy at Butte, Montana, this 16 day of March, 1901.

McHATTON & COTTER,
Attorney- for Defendants.

110 [Endorsed:] 35. In U. S. court. B. & M. Con. C. & S. M. Co. *v.* Mont. O. P. Co. *et al.* Citation. Filed and entered Mar. 18 1901 Geo. W. Sproule, clerk. By T. B. Stephens, deputy clerk.

111 UNITED STATES OF AMERICA, *District of Montana,* } ss:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

I, George W. Sproule, clerk of the United States circuit court for the district of Montana, do hereby certify and return to the honorable the Supreme Court of the United States, that the foregoing volume, consisting of 111 pages, numbered consecutively from 1 to 111 inclusive, is a true and correct transcript of the pleadings, certificate of question of jurisdiction orders, exhibits and other pro-

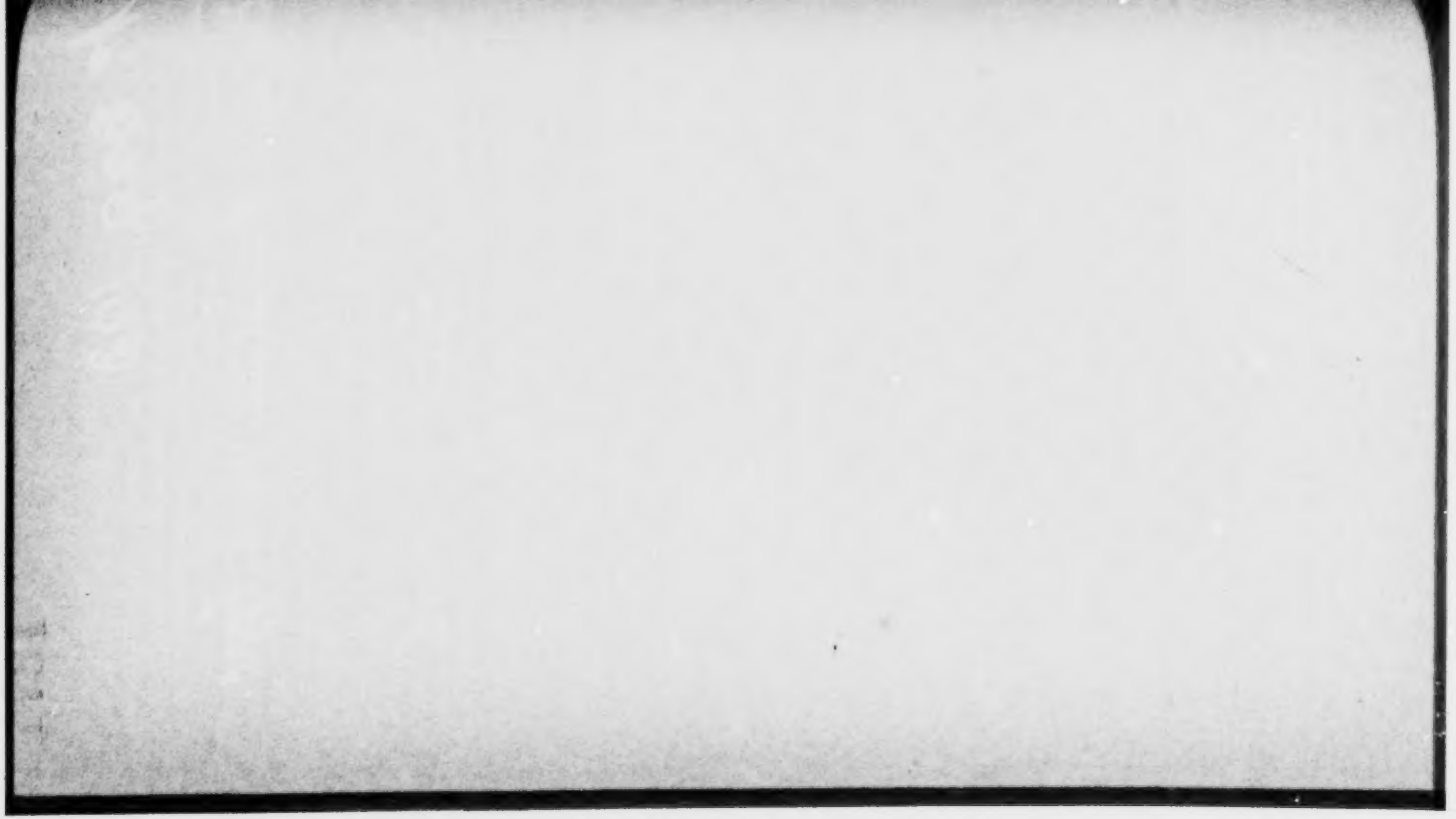
ceedings had in said cause and of the whole thereof, as appears from the original records and files of said court in my possession; and I further certify and return that I have annexed to said transcript and included within said paging the original citation.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Helena, in the district of Montana, this 6th day of May, in the year of our Lord one thousand nine hundred and one, and of the Independence of the United States the 125th.

[Seal United States Circuit Court, District of Montana, 1890.]

GEO. W. SPROULE, *Clerk.*

Endorsed on cover: File No. 18,175. Montana C. C. U. S. Term No. 329. The Boston and Montana Consolidated Copper and Silver Mining Company, appellant, *vs.* The Montana Ore Purchasing Company, F. Augustus Heinze and Arthur P. Heinze. Filed May 21, 1901.



St. Bag. 103

Supreme Court U.S.
FILED
APR 9 1902
JAMES H. MCKENNEY,
Clerk.

Brf. of Marshall & Forbis.

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 329.

Filed April 9, 1902.

THE BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING COMPANY,
APPELLANT,

vs.

THE MONTANA ORE PURCHASING COMPANY, F. AUGUSTUS HEINZE and ARTHUR P. HEINZE,
APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

BRIEF AND ARGUMENT FOR APPELLANT.

LOUIS MARSHALL,
JOHN F. FORBIS,
Appellant's Counsel.

APPEAL PRINTING CO., 49-55 Vesey Street, N. Y.

Supreme Court of the United States.

THE BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING COMPANY,
Appellant.

vs.

THE MONTANA ORE PURCHASING COMPANY, F. Augustus Heinze, and Arthur P. Heinze,
Appellees.

Oct. Term, 1901.

No. 329.

Appeal from the Circuit Court of the United States for the District of Montana, Southern Division.

BRIEF AND ARGUMENT FOR APPELLANT.

Statement.

This suit was brought for the purpose of preventing trespasses by the appellees on property claimed by the appellant, of avoiding a multiplicity of actions, and of quieting the title to that portion of the Pennsylvania Lode Claim from which ores alleged to belong to the appellants were extracted by the appellees.

This is the same suit which was considered by the United States Circuit Court of Appeals in *85 Federal Reporter, 867*, on an appeal from an order

granting a temporary injunction. The order was reversed because it was held that the bill of complaint did not plead any federal question. In the course of his opinion, Judge Morrow, however, said:

"At the oral argument and in the briefs that have been filed a federal question has been suggested as arising out of the dispute as to the rights of the parties under the Rarus and Johnstown patents; but, as this controversy does not appear in the complaint, it cannot be considered. The jurisdiction of the Circuit Court of the United States is limited, in the sense that it has no other jurisdiction than that conferred by the constitution and laws of the United States. The presumption is that a case is without its jurisdiction, unless the contrary affirmatively appears; and it is not sufficient that jurisdiction may be inferred argumentatively from averments in the pleadings, but the averments should be positive. * * * It will be for the Court below to determine whether the complaint can be so amended as to present a cause within its jurisdiction."

Accordingly, on the filing of the mandate a motion was made for leave to amend the bill of complaint, so as to present the federal question which had been discussed, but not pleaded, on that appeal, and leave being granted, an amended bill of complaint was filed by the appellant, which was held by Judge Knowles not to confer jurisdiction upon the United States Circuit Court. To review which ruling this appeal has been taken.

The bill of complaint shows the following facts:

The Pennsylvania Lode Claim in the Summit Valley Mining District at Butte, Montana, now owned by the appellant, was duly located on June 18th, 1877, by William Harris, Sr., and William Harris, Jr., and

a patent therefor was issued on April 9th, 1886 to William Harris, Senior, William Harris, Junior, John E. Lloyd, David J. Lloyd, Thomas E. Lloyd, Jeremiah Griffith, Thomas Griffith, and John Dunstan, who had been the owners of all possessory rights under the claim from March 7th, 1883, their interests, however, being unequal (pages 6, 7).

On November 30th, 1888, the appellant became vested with the title to this lode and has ever since been the owner.

Immediately north of the Pennsylvania Claim, locations were made of the Rarus and Johnstown lodes, the latter being known as Lot 173 and the former as Lot 179. The patents issued for these lodes, together with the plats forming a part of such patents, appear at pages 12 and 16 of the record and form a part of the bill of complaint.

The appellee, the Montana Ore Purchasing Company, is the owner of the Rarus and of that portion of the Johnstown lode which is described in the conveyance referred to at page 128 of the record.

It has been the claim of the appellees in the course of the extensive controversies which have arisen between the parties hereto that although the Rarus patent covers but 2.98 acres of surface, in addition thereto it grants 1318 linear feet of lode, and that the ore which has been extracted from beneath the surface of the Pennsylvania lode, which is described in the bill of complaint, constitutes a part of the Rarus lode lying beyond the limits of the surface covered by the Rarus patent.

It has been likewise claimed by the appellees that, although the larger portion of the ground owned by them was originally included within the location of the Rarus claim, it was patented as the Johnstown claim, but that the veins extending un-

der the surface of the Johnstown claim possessed extralateral rights in the Pennsylvania ground, not by virtue of the Johnstown patent, but by virtue of the Rarus patent.

To indicate that we are correctiy stating the appellees' position, we quote from their brief, filed in the United States Circuit Court of Appeals on an appeal from an order granting a temporary injunction against them (*85 Fed. Rep., 867*):

"The appellant, the Montana Ore Purchasing Company, contends that the veins from which it has been extracting ore underneath the surface of the Pennsylvania, have their top or apex within the Rarus lode, as located, surveyed, and patented, and that they depart, on their course or strike, through both end lines thereof, and are continuous on both strike and dip; and that said veins were expressly granted and conveyed to it by the United States patent for said Rarus Lode Claim; that its predecessors in interest were the owners of the Rarus Lode Claim, as located, embracing all the ground within the patent survey lines, at the time they made application for patent, and in possession and entitled to the possession thereof, and of the Rarus lode, and all other lodes, leads, ledges, and deposits having their tops or apexes, therein, which ownership, possession, and right of possession were subject only to the paramount title of the United States, and that they did all and every act and thing necessary to entitle them thereto, as established by the patent itself; that this being true, and the government having the right to grant all or any part thereof to them—there being no prior rights or adverse claims thereto by any third person—and the government having made the grant as recited by the patent, said patent and the rights granted thereunder are valid, and cannot be questioned in this suit or at all, and that therefore said appellant had and has, the absolute right, under the statutes of the United States, to extract the ore from the veins in controversy in this suit."

"Said appellant further contends, as a matter of fact, that the veins in controversy in this suit pass through that portion of the Johnstown owned by appellant and described in the deed above mentioned, and have a portion of their apexes therein, and that they pass on their strike through the end lines of the Johnstown as located and patented."

"While appellant relies primarily upon the Rarus patent and the rights therein granted, it at the same time asserts that the appellee is, by reason of the above-mentioned deed and the acts of appellee's predecessors in interest (the owners of the Pennsylvania and locators of the Johnstown), estopped to dispute this contention."

"Appellee, as we understand, contends that the Rarus Lode Claim has no proper end lines, and therefore is not entitled to any extralateral rights; that the owners of the Rarus are not entitled to any vein or veins beyond the limits of the surface granted by the patent, or beyond the surface lines of that portion conveyed to them by the owners of the Johnstown and described in the deed before mentioned; that is to say, we understand the appellee claims that the grant of the patent for the Rarus lode for the full length thereof between the survey and patented end lines, together with all other veins, lodes, or deposits having their top or apexes therein, gives no rights to such veins, lodes or deposits beyond the said surface limits, and that the veins having their apexes within that portion of the Johnstown owned by appellants depart on their course or strike through the side lines of the Johnstown, and therefore appellants are not entitled to claim extralateral rights thereto under the said deed or the Johnstown patent."

That this presented a federal question is indicated by the elaborate argument of appellees' counsel, based solely upon the United States Revised Statutes, as appears from the following heads of their argument which were carefully elaborated by references to numerous sections of the federal legislation relating to mineral lands:

"I. The statutes of the United States relating to this subject separately provide for the purchase of mineral deposits and for the purchase of lands containing the mineral deposits.

"II. Under the present laws the substance of the grant under the mining statutes is the mineral-bearing veins, to which the surface is a mere adjunct.

"III. The mining statutes in many ways recognize the distinction between surface rights and underground rights.

"IV. The statutes recognize a distinction between locations or claims on the one hand and patented premises or parts of claims on the other."

The appellant took issue on these various propositions, insisting that under the mining statutes no valid patent could be issued conveying a lode independently of the surface in or under which it had its apex.

This Court having never passed on the controversy thus presented, a subject of cognizance by the Federal Courts was clearly involved.

It is this contention which was referred to by the United States Circuit Court of Appeals as presenting a federal question which did not appear in the complaint. It was evidently considered as being of sufficient importance to present a cause for federal jurisdiction and to merit presentation in the form of an amended bill of complaint. Accordingly, the amended bill of complaint added to the jurisdictional allegations which the Court declared to be insufficient, the allegations appearing at pages 13 to 17 of the record.

The appellant was justified in so pleading, not only by the argument of the appellees in the United States Circuit Court of Appeals, but also by their insistence in an action between the same parties, which is reported in *20 Montana, 336*, and in an action which

they have brought in the United States Circuit Court, Division of Montana, against the appellant.

Defendants answered the amended bill, admitting their ownership of the Rarus claim and of the portion of the Johnstown claim referred to in the complaint (page 21). They alleged that the vein upon which they mined within the lines of Pennsylvania claim had its apex within that portion of the Johnstown Lode Claim owned by them, and that such vein passed on its strike through the end lines of the Johnstown claim as located and patented, and that such end lines were parallel.

For the purpose of ousting the Federal Courts of jurisdiction, the appellees thereupon made the following extraordinary allegations (pages 24 to 27):

"And the defendant, as showing to your Honors that the questions involved in this case are not questions arising under the statutes of the United States, or involving the construction thereof, alleges that it does not claim to own a portion of the ground patented under both the Rarus and Johnstown patents, or that it claims *in this action* that by virtue of said Rarus patent it has acquired 1,318 linear feet of what is designated or called the Rarus lode; and denies that it is contended *in this action*, by the defendant, that under and by virtue of said Rarus patent it or its predecessors in interest were granted 1,318 linear feet to the Rarus lode, extending from what is known as the east end line of the Rarus claim to an imaginary or projected line of the Rarus location."

"Defendant alleges that it claims to own, and does own, whatever rights were granted under the patent for the Rarus Lode Claim issued by the United States, but that it does not assert any title *in this action* under said patent as against the complainant, but relies upon its ownership of that portion of the Johnstown and Pennsylvania Lode Claims hereinafter described."

"Defendant admits that the surface ground granted to the predecessors in interest of the de-

fendant in the Rarus Lode Claim is as shown by the yellow shading on the map attached to the Rarus patent, but defendant denies that it contends *in this action* or claims that the patent for the Rarus Lode Claim granted to it or its predecessors in interest to the Rarus lode beyond the surface ground granted by the Rarus patent, or to the full extent thereof of 1,318 linear feet; and denies that it contends or claims *in this action* that by reason of the ownership of said lode for the length aforesaid, or by reason of the fact that the same passes through the east end line of the Rarus Lode Claim as patented and the west end line of the original location of said claim, that it is entitled to follow said veins on their course or dip into the earth without the lines of the Rarus Lode Claim, either as originally located or as patented."

"And defendant alleges that *in this action* that it makes no claim of any right under the Rarus patent to enter upon the vein within the grounds claimed or owned by the complainant, but that it asserts its right to do so by reason of its ownership of a portion of the Johnstown Lode Claim, and the fact that the top or apices of the veins or load in question are within said portion of the Johnstown Lode Claim. Defendant admits that a large portion of the ground which was originally included within the location of the Rarus claim has been patented under the said Johnstown patent, and defendant denies *that in this action* it contends or claims that only the surface ground of the Johnstown Claim was patented to the patentees named herein, or that all or any veins lying within the original location lines of the Rarus claim were patented to the claimant under the Rarus claim; and denies that it claims or contends that it is entitled to claim the veins extending through the Johnstown patent under or by virtue of the Rarus patent, or that its extralateral rights should be determined by the Rarus patent, and not by the Johnstown patent; but defendant alleges that it contends and claims *in this action, and in so far as this controversy between complainant and defendant is concerned,*

that its extralateral rights to the veins in question should be determined by its ownership in that parcel of ground now included within the Johnstown claim and not by the Rarus, for the reason that the said vein or lode have their top or apex within the said parcel of ground owned by the defendant."

"Defendant denies that it makes any claim in *this action* that if it has no right to follow the veins within the lines of the original Rarus location by virtue of said Rarus patent, that it has a right to follow the same under and by virtue of the Johnstown patent, or of the Johnstown and Rarus patents combined, under and beneath that portion of the Pennsylvania Lode Claim belonging to the complainant; and defendant asserts that it does not rely upon any combination of the Johnstown and Rarus patents *in this action*, but relies upon its ownership of this parcel of ground conveyed to its predecessors by the owners of the Johnstown claim and the Johnstown patent."

* * * * * *

"As there is no controversy between the complainant and defendant *in this action* upon any of the matters or things suggested or stated by the complainant in its amended bill of complaint for the purpose of showing that this Court has jurisdiction, defendant therefore asserts that this Court has no jurisdiction of the subject matter of this action or the controversies between the complainant and defendant herein."

An application was made by the appellees on this state of the pleadings to the Circuit Court for a dismissal of the bill of complaint on the ground of a want of jurisdiction which application was sustained, and thereupon the Court certified "that upon the said amended bill of complaint, and the said answer thereto, this Court sustained said application to dismiss, and entered a decree of dismissal in accordance therewith, holding that a

federal question was not presented by said allegation and that in consequence thereof there was no jurisdiction in this Court in said action" (pages 35 to 51).

Error is assigned upon the ruling so certified (page 52).

APPELLANT'S ARGUMENT.

I.

The amended bill of complaint conferred jurisdiction upon the Circuit Court of the subject matter in controversy, although divers citizenship of the parties does not exist.

While it is undoubtedly true that the presumption obtains that a case is without the jurisdiction of the Circuit Court, and that it is necessary by positive averment in the pleadings to show the existence of jurisdiction, it is, nevertheless, true that the Federal Courts will not strain to decline the exercise of jurisdiction where a reasonable showing for assuming it has been made.

Nashville Ry. v. Taylor, 86 Fed. Rep., 168.

It has been held that a suit cannot properly be dismissed by a Circuit Court of the United States as not involving a controversy within the jurisdiction of the Court, unless the facts as made to appear on the record create a legal certainty of that conclusion.

Barry v. Edmunds, 116 U. S., 550.
DePutron v. Young, 134 U. S., 241.

In *Starin vs. New York*, *115 U. S.*, *248*, Chief Justice Waite said:

"If from the question it appears that such *title*, right, privilege or immunity on which a recovery depends will be defeated by one construction of the Constitution or law of the United States, or sustained by the opposite construction, the case will be one arising under the Constitution and the laws of the United States within the meaning of that term as used in the Act of 1875."

The facts here presented indicate Federal jurisdiction.

(*A*) The bill of complaint clearly presents a federal question arising under the mining laws of the United States, involving a substantial controversy existing between the parties, based upon these statutes, which must be finally passed upon, in order to determine their respective rights in the property which is the subject matter of this litigation.

(*a*) The allegations added by the amended complaint present a most important question under the mining laws, which has never received adjudication at the hands of the Supreme Court, and one which has been much mooted by text writers, as well as by the parties to this litigation. The question relates to the right of the land department to segregate the surface of mineral lands from the mineral in the ground, granting the former to one person and the latter to another. The solution of this question necessarily involves the consideration of the entire body of Federal statutes relative to locating, purchasing and patenting mineral lands, and the rights of patentees, under governmental grants, where the land department has assumed to patent a lode as distinguished from the surface overlying it.

U. S. R. S. §§ 2320, 2322. In *Montana Ore Purchasing Co.* vs. *Boston & Montana Consolidated Copper Co., 20 Mont., 336 S. C., 51 Pacific Rep., 158*, the nature of this question is thus stated by Mr. Justice Buck:

"Appellant calls to our attention various expressions, occurring in different sections of the United States mineral land statutes, for the purpose of showing that the surface is not regarded as an essential incident of the lode or vein in or below. It is no doubt true that those statutes, taken as a whole, give greater prominence verbally to the lode or vein than to the surface connected therewith; but this naturally results from the fact that the lode is the main subject treated. Such expressions and such prominence, however, cannot avail to permit the grant of lodes or veins embraced in a located quartz claim regardless of the surface connected therewith. In support of this ruling, we deem it necessary to cite only from a most valuable treatise on mines which has just been published. In Section 780, Vol. 2, Lindl. Mines, and Sections 58–60, Vol. 1, *id.*, the author most ably discusses the subject of the relationship of the surface to the lode, and collates the federal and State decisions directly pertaining thereto."

(*b*) The fact that in this very case the appellees deliberately argued that question before the Circuit Court, with consummate ability and thorough elaboration, is in itself a demonstration that such a Federal question exists.

(*c*) The seriousness with which the matter has been discussed by the Supreme Court of Montana in an action between these parties, relating to the very property now in controversy (*20 Mont., 337*), likewise indicates that the claim set forth in the bill of complaint as a ground for asserting jurisdiction, relates to a real and substantial controversy.

(*d*) This is accentuated by the fact that there is now pending in the Circuit Court still another action between these parties, in which the appellees assert their rights under the Rarus claim with respect to ore bodies adjoining those which are under consideration here on the sole ground now suggested.

(*e*) The action of the Circuit Court of Appeals on the former appeal of intimating to the Court below the propriety of an amendment of the bill of complaint so as to present a cause within its jurisdiction, indicates that that Court must have considered the questions argued before it on that appeal, but which were not pleaded in the bill of complaint, to sufficiently present a jurisdictional question.

(*f*) But it is now claimed that the question of what was granted by the Rarus patent merely involves the interpretation of a written instrument, and not the consideration of any Federal Statute.

It is a sufficient answer to this claim that the controversy is not as to the language employed in the patent, but as to whether or not, under the statutes of the United States, such patent had validity in so far as it assumed to segregate the surface from the mineral lying therein. That is not and was not treated by the appellees counsel on the former appeal as a question involving the interpretation of the patent, but one which clearly involved the construction of the statutes under which the patent purported to have been issued Appellees counsel, in their former brief, frankly state the controversy involved between the parties as follows:

"We are therefore brought directly to the question as to whether, under the statutes, the patent-

ed surface of a mining claim and the underground rights to the veins are necessarily coterminous. The contention that they are, entirely ignores various statutory provisions, and is contrary to the whole tenor of the mining statutes."

(*g*) The claim that if the Rarus patent is out of the way the case turns entirely upon the Johnstown patent, and that the latter presents no Federal question, is scarcely ingenuous.

The position which the appellees have taken is that they are entitled to the ore bodies in controversy, under the Rarus patent, even though their claim under the Johnstown patent is of no avail, because the apex of the vein passing through the Johnstown on its strike crosses its side lines, instead of its end lines. Hence, it will become necessary, in order to obtain a final adjudication upon the rights of the respective parties as to the property rights involved, to pass upon the validity of the appellees' claim, which is based on the Rarus patent. Until that is done, there will be a continuance of the controversy between the parties.

(*h*) A further Federal question is presented by the claim that the complainant cannot obtain relief for ores taken without showing that the apices of the veins from which the ore was so extracted were within its own premises (page 8).

Assuming that the appellees have no extralateral rights, based either upon the Johnstown or Rarus patents, it will become necessary to determine whether, on the assumption that the apices of the veins in which the ore in controversy is found are beyond the Pennsylvania boundaries, the appellant would be entitled to such ore.

This is a much mooted question, as to which there is a division of judicial opinion, and which,

so far as known, has not received direct adjudication from this Court. Judge Knowles, in *Montana Co., Limited, v. Clark, 42 Fed. Rep., 626,* has decided the question one way, and adheres to his opinion, notwithstanding the contrary views expressed in

Leadville Mining Co. v. Fitzgerald, 4 Morrison's Mining Reports, 380.
Duggan v. Davey, 4 Dak., 110.
Doe v. Waterloo, 54 Fed. Rep., 935.
Consol. Wyom. Co. v. Champion Mining Co., 63 Fed., 540.

(*i*) At the time when this suit was commenced and the amended bill of complaint was filed this Court had not decided *Del Monte Mining and Milling Co. vs. Last Chance Mining and Milling Co., 171 U. S., 55,* which involved the question of the right to locate claims so as to project an end line on lands patented to another locator, for the purpose of and to create such parallelism of end lines, as is essential to the presence of extralateral rights.

That important federal question was in all seriousness presented in the present suit, by the allegations at page 7 of the record.

As is shown by the authorities herein cited, the question of jurisdiction is to be determined by the case made in the bill of complaint, and a question arising under the Act of Congress then mooted and undetermined necessarily was a federal question, even if in consequence of a subsequent decision by the ultimate tribunal it thereafter ceased to be one.

(*j*) The question is also presented as to the rights of the complainant to the property and property rights in controversy based on the alle-

gation "that the apex of the veins from which the ores in question were extracted is divided in that a portion thereof is claimed by the defendants as upon the Rarus Lode Claim and a portion thereof upon fhe Johnstown Lode Claim, and a portion thereof upon the Pennsylvania Lode claim, and defendants claim that by reason of the said divided apex that they may claim the right to follow the said vein beneath the surface and without the lines of the Rarus and Johnstown claims, under and by virtue of either or both of the said claims at their election" (pages 8 and 9).

The ascertainment of the rights of adjoining locators resulting from the existence of a divided apex involves the determination of an important questison of the interpretation of U. S. R. S., § 2322, as to which the Courts are in conflict.

Hall vs. Equator Mining Co., 11 Federal Cases, 225.

Bullion Beck & Champion M. Co. vs. Eureka Hall M. Co., 5 Utah, 3.

2 Lindley on Mines, § 583.

(*B*) This brings us to the discussion of a number of well-settled principles governing the determination of what constitutes a federal question.

(1) The federal questions stated in outline, existing, it by no means follows that to confer jurisdiction it will be actually necessary for the Court, when it comes to pass upon the case, to base its decision on those questions, or even to conclude that the appellant's position on the merits of those questions is sound.

As has been recently said by Judge Clark, in *Nashville C. & St. L. Ry. v. Taylor, 86 Fed. Rep., 168:*

"It will be well before dealing more closely with the question of jurisdiction here raised to note the clear distinction between the existence of a federal question, for the purpose of jurisdiction, and the actual decision of that question on its merits. Whether there is a claim which presents the federal question, and whether that claim is well founded, when considered on its merits, are different and distinct questions. The one goes to jurisdiction and the other to the merits of the case. It is true the question must be raised, and it is true that the Court must take the jurisdiction before it can determine whether the right is valid or well founded. This distinction must be attentively observed to avoid confusion. The distinction was referred to in the case of *Mayor v. Cooper*, *6 Wall.*, *247*, the Court saying: 'We entertain no doubt of the constitutionality of the jurisdiction given by the acts under which this case has arisen. The validity of the defense authorized to be made is a distinct subject. It involves wholly different inquiries. We have not had occassion to consider it. It has no connection whatever with the question of jurisdiction.' "

Again, in *Insurance Co. v. Needles*, *113 U. S.*, *574*, Mr. Justice Harlan said:

"And our jurisdiction is not defeated because it may appear, upon examination of this federal question, that the statutes of Illinois are not repugnant to the provisions of that instrument. Such an examination itself involves the exercise of jurisdiction. The motion to dismiss the writ of error upon the ground that the record does not raise any question of a federal nature must, therefore, be denied."

So in *Southern Pac. R. Co. v. California*, *118 U. S.*, *112*, Chief Justice Waite, delivering the judgment of the Court, said:

"Applying these rules, which must now be considered as settled, to the present case, it is ap-

parent that the Court below erred in deciding that the suit was not removable, for it distinctly appears that the right of the State to recover was made by the pleadings to depend (1) on the power of the State to tax the franchises of the corporation derived from the acts of congress, which were specially referred to, as well as the property used in connection therewith; and (2) on the effect of Article 14 of the amendment of the constitution on the validity of the construction of statutes under which the taxes sued for were levied. The first depended on the construction of the acts of congress, and the second on the construction of the constitutional amendment. If decided in one way, the State might recover; if in another it would be defeated at least in part. The right of removal does not depend upon the validity of the claim set up under the constitution or laws. It is enough if the claim involves any substantial dispute of controversy in the suit. In this case there can be no doubt about that."

The distinction was brought out clearly again in the recent case of *Insurance Co. v. Austin*, *168 U. S.*, *695*, in which Mr. Justice White, speaking for the Court, said:

"Of course, the claim must be real and colorable, not fictitious and fraudulent. The contention here made, however, is not that the bill, without color of right, alleges that the State law and the city ordinances violate the constitution of the United States, but that such claim as alleged in the bill is legally unsound. The argument, then, in effect, is that the right to a direct appeal to this Court does not exist where it is claimed that a State law violates the constitution of the United States, unless the claim be well founded. But it cannot be decided whether the claim is meritorious, and should be maintained, without taking jurisdiction of the case."

(2) In like manner, the fact that the case involves questions depending on general principles

of law, in addition to the federal questions, and may be eventually decided on the former, does not prevent the jurisdiction from attaching.

As was said by Chief Justice Marshall, in *Osborne v. Bank of the United States, 9 Wheaton, 738-822:*

"We perceive, then, no ground on which the proposition can be maintained, that congress is incapable of giving the Circuit Court's original jurisdiction, in any case to which the appellate jurisdiction extends.

"We ask, then, if it can be sufficient to exclude this jurisdiction, that the case involves questions depending on general principles? A cause may depend on several questions of fact and law. Some of these may depend on a construction of a law of the United States; others on principles unconnected with that law. If it be a sufficient foundation for jurisdiction, that the title or right set up by the party may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction, provided the facts necessary to support the action be made out, then all the questions must be decided as incidental to this, which gives that jurisdiction. Those other questions cannot arrest the proceedings. Under this construction the judicial power of the Union extends effectively and beneficially to that most important class of cases, which depend on the character of the cause. On the opposite construction, the judicial power never can be extended to a whole case, as expressed by the constitution, but to those parts of cases only which present the particular question involving the construction of the constitution or the law. We say it never can be extended to the whole case, because, if the circumstance that other points are involved in it shall disable Congress from authorizing the courts of the Union to take jurisdiction of the original cause, it equally disables Congress from authorizing those Courts to take jurisdiction of the whole cause, on an appeal, and

thus will be restricted to a single question in that cause; and words obviously intended to secure to those who claim rights under the constitution, laws, or treaties of the United States, a trial in the Federal Courts, will be restricted to the insecure remedy of an appeal upon an insulated point after it has received that shape which may be given to it by another tribunal, into which he is forced against his will.

"We think, then, that when a question to which the judicial power of the Union is extended by the constitution forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or of law may be involved in it."

The same idea was expressed in *R. R. Co. v. Mississippi*, *102 U. S., 140*, where the Court said:

"It is not sufficient to exclude the jurisdiction of the judicial power of the United States from a particular case, that it involves questions which do not at all depend on the constitution or laws of the United States, but when a question to which the judicial power is extended by the constitution forms an ingredient of the original cause, it is within the power of Congress to give the Circuit Court jurisdiction, although other questions of fact may be involved in it."

In *Mayor v. Cooper*, *6 Wallace, 253*, the Court, discussing the same question, said:

"Nor is it any objection that questions are involved which are not at all of a federal character. If one of the latter exists—if there be a single such ingredient in the mass—it is sufficient. That element is decisive upon the subject of jurisdiction."

In *Gold Washing and Wateriag Co. v. Keyes*, *96 U. S., 203*, Chief Justice WAITE said:

"The suit must at least in part arise out of a

controversy between the parties, in regard to the operation and effect of the constitution or laws upon the facts involved."

That such a controversy exists between the parties to this litigation is absolutely demonstrated by the history of this litigation, and is affirmatively and positively averred in the bill of complaint.

(3) This case does not come within the principle of the authorities which deny jurisdiction where it does not appear from the statement of the complainant's cause of action that a federal question exists.

Reading the bill of complaint according to its clear scope and in its true spirit, it discloses the appellant's *grievance* to be, that while it asserts ownership under government patents to the Pennsylvania claim, and to all ore contained within its boundaries, the appellees are questioning its title, and interfering with its enjoyment of its property right, by asserting the ownership of a portion of such claim, based upon two government patents, issued for the Rarus and Johnstown claims respectively; that such asserted ownership of the appellees is without legal foundation, for the reasons stated in the bill, the consideration of which necessitates its examination of federal questions. Hence, the case is in effect one to quiet the appellant's title; or to prevent an interference with its rights of property, the nature and extent of which depends upon a determination of federal questions. That is its subject matter, and in referring to the appellees' claim, and assuming that under the mining laws it is a wrongful interference with the appellants' property rights it has stated its own claim, its own cause of complaint and not the appellants' defenses.

Or to still more simplify the case, the questions presented by the complaint are these: The complainant asserted ownership of a quantity of ore in place, and to ore which had been taken from within the boundaries of the Pennsylvania claim the surface rights to it. A controversy existed between the complainant and the defendants as to the ownership of this ore. This controversy involved a number of propositions, the determination of which were essential to the complainant's right of recovery. It was not sufficient for the complainant to show that the ore was taken from within its boundaries in view of the doctrine of extra-lateral rights appertaining to mining claims. If the apex of the vein from which the ore was taken was in ground belonging to the defendants, the complainant would have no right to the ore; hence the solution of the propositions which are stated in the bill of complaint became essential for the purpose of determining whether or not the complainant had a cause of action against the defendant.

If the vein did not apex in either the complainant's or in the defendants' property, then a Federal question was presented under the authorities already considered. If the vein did not apex in the ground patented to the locators of the Rarus claim, although it did apex within the ground of the original location of that claim but which was not patented to the locators, then a federal question was presented. If the vein apexed on the boundary line between the Johnstown and the Pennsylvania claims, and the vein had a divided apex, a federal question was presented.

Hence the controversy between the complainant and the defendants was one which necessarily involved the ascertainment not only of the boundaries of the complainant's patent, but likewise

the strike, dip and apex of the vein in which the ore in controversy was found, and the complainant's cause of action as to such ore and a proper statement thereof properly involved the allegations are contained in the bill of complaint herein and which as has been shown present a number of very important federal questions.

In this regard the case differs materially from the authorities in which the complainant's cause of action and the complainant's right does not involve the statement of a federal question, but where the complaint, by way of anticipation of a defence which may or may not be interposed, or which may or may not exist, referred to such pretended defence and sought to show that it would involve a federal question.

In *Tennessee v. Union and Planters' Bank*, *152 U. S., 454*, the State brought an action to recover taxes alleged to be owing. The complaint then asserted that the defendant claimed exemption under its charter, and that the revenue law imposing the taxes impaired the obligation of a contract, and further alleged: "It may be, however, that complainants are mistaken in the foregoing construction of the Charter, and that the shares of stock are taxable, and the capital stock of said institution exempt. The question is one of law, and is submitted to the Court for determination."

On this showing it is apparent that the plaintiff was merely attempting to anticipate the defenses which the bank might interpose, and was not alleging matters which were involved in its cause of action.

Chappell v. Waterworth, *155 U. S., 102*, and *Walker v. Collins*, *167 U. S., 57*, were removal cases, in neither of which did the complaint indicate the existence of a federal question. In the first the action was in ejectment simply, and the

answer claimed occupation under the United States for light-house purposes. In the second, the action was in trover, and the answer justified under an attachment issued out of the United States Circuit Court. Mr. Justice WHITE said:

"As in the complaint in the case at bar, there are no facts averred showing that the controversy was one arising under the laws of the United States, and it was not essential to the statement of the cause of action that such facts should be averred; the case comes directly within the operation of the ruling cited."

In *City of Fergus Falls v. Fergus Falls Water Co.*, *72 Fed. Rep.*, 873, the same point of differentiation exists.

Judge Caldwell says:

"The plaintiff seeks, in its complaint, to inject a federal question into the case by suggesting that the defendant will interpose as a defense to the suit a resolution of its council, which impaired the obligation of the contract, in contravention of the constitution. It is apparent that the only use the plaintiff proposes to make of the constitution is as a barrier to a defense which the plaintiff suggests the defendant may set up. The appeal to the constitution is made, not to support the plaintiff's cause of action, but by way of replication to an anticipated defense."

Here the allegations relate to the appellants cause of action; they state the controversy existing between the parties as to its subject matter, not as anticipatory of the defense, but as establishing the appellant's right to have its title quieted.

It is important to note that in the case cited, there was a vigorous and well-reasoned dissenting opinion by Judge Sanborn, strongly supported by authority, and that the decision actually proceeded on the theory that the trial disclosed that no

federal question was involved, but simply one of power under the laws of Minnesota.

In *Walla Walla v. Walla Walla Water Company* (*172 U. S., 1*), which was subsequently decided, a bill was filed in the United States Circuit Court by the Water Company to enjoin the city from creating proposed water works, or from expending city moneys for that purpose, or from issuing city securities therefor, it being alleged that by an act of the legislature of Washington Territory the city was empowered to provide itself with a sufficient supply of water and to permit the use of its streets for the purpose of laying pipes for furnishing such supply for a term not exceeding twenty-five years. Under this authority the City, by contract, granted to the Water company the right to lay and maintain water mains for twenty-five years under certain conditions, among others that the contract was voidable by the city so far as it required the payment of money upon a judgment of a Court of competent jurisdiction, whenever there should be a substantial failure of the water supply, or a like failure on the part of the Water Company to perform its agreements, and that until the contract should have been so avoided, the city should not erect or maintain, or become interested in other water works. These provisions were accepted by the Water Company and were complied with by it. Before the expiration of the contract period the city authorities passed an ordinance to provide for the construction of a system of water works to supply the city with water and to issue bonds for that purpose, which ordinance was accepted by the necessary majority of legal voters.

The bill of complaint alleged that the ordinance under which the city was seeking to justify its

action constituted an impairment of the obligation of the contract between the city and the Water Company, and jurisdiction was asserted on that ground only, there being no diversity of citizenship. A demurrer was interposed to the bill on the ground of want of jurisdiction and in considering that subject Mr. Justice Brown said:

"The jurisdiction depends specifically upon the allegation in the bill that *defendants insist that the contract of the city with the plaintiff was not a valid and binding contract*, either with respect to the stipulation binding the city not to erect, maintain or become interested in any system of water works other than those of the plaintiff, or in respect to the stipulation for furnishing water to the city by plaintiff; and that, regardless of plaintiff's rights, the city refuses to be bound by the contract, and is proposing to borrow money to erect and maintain water works of its own, and become a competitor with the plaintiff for the trade and custom of the consumers of water; * * * and in short, that the proposed action of the city is in fraud of plaintiff's rights under its contract with the city, and the protection guaranteed to it under the Constitution of the United States" (p. 7).

The opinion proceeds (p. 11):

"The argument which attacks the jurisdiction of the Court upon the ground that the complaint is devoid of facts showing any matter which vests jurisdiction, goes rather to the sufficiency of the pleading than to the jurisdiction of the Court. Even if this objection had been sustained, the difficulty could have been easily obviated by amendment. We think, however, that it sufficiently appears that if the city were allowed to erect and maintain competing water works, the value of those of the plaintiff company would be materially impaired, if not practically destroyed."

In *Cox v. Gilmer* (*88 Fed. Rep., 343*), an action for false imprisonment, averments were made in the declaration that defendants, acting as judges of an election, caused plaintiff's arrest and imprisonment under color of a State law which is repugnant to the Constitution of the United States. It was held that these allegations were not open to the objection of anticipating the defense for the purpose of showing that a federal question was involved, and that jurisdiction was conferred on the United States Circuit Court thereby.

After citing *White v. Greenhow* (*114 U. S., 307*), the Court said:

"The Court is unable to draw any distinction between the averments in the declaration in White v. Greenhow, *supra*, and the averments in the declaration in the case we are now considering. In each case the injuries complained of are alleged the direct result of the operation of a legislative act that is repugnant to the Constitution of the United States. The plaintiff in this case does not, as contended by counsel for the defendants, allege or suggest that the defendants will set up by way of defense a claim that they acted under the constitution or laws of the United States, in order to raise a federal question, of which this Court was to have jurisdiction. The doctrine established by the decisions in Tennessee v. Union & Planters' Bank, and in the other cases cited, is not applicable here."

The cases of *Blackburn v. Portland Gold Mining Company* (*175 U. S., 571*) *and Shoshone Mining Company v. Rutter* (*177 U. S., 505*), which will probably be cited by the appellees, are not parallel cases. Both of them involve a controversy between two claimants to a mining patent, jurisdiction over which was conferred by express legislation upon "a Court of competent jurisdiction" to determine the question of the right of possession.

The controversy did not involve the interpretation of any federal legislation or constitutional provision, but solely questions of fact.

The view of this Court is summarized in the concluding sentence of the opinion of Mr. Justice Shiras in the first of these cases, in which he says:

"Without undertaking to say that no cases can arise under this legislation which then upon a disputed construction, and therefore presenting a question essentially federal in its nature, we hold that clearly where a patent is authorized to be issued to the party in possession, the statutes refer the contest to the ordinary tribunals, which are to determine the rights of the parties without any controversy as to the construction of those acts, but are to be guided by the laws, regulations and customs of the mining district in which the lands are situated. In a case, therefore, like the present, where federal jurisdiction does not arise because the parties are citizens of different States, and where no question is made as to the meaning and construction of the Statutes of the United States, the State Courts are to be regarded, with the letter and meaning of Section 2326 (U. S. R. S.) as Courts of 'competent jurisdiction to determine the right of possession.'"

In the second of these cases Mr. Justice BREWER, after a reconsideration of the doctrine laid down in the *Blackburn case*, says:

"So we conclude, as we did in the prior case, that although these suits may sometimes so present questions arising under the constitution or laws of the United States that the federal Courts will have jurisdiction, yet the mere fact that a suit is an adverse suit authorized by the Statutes of Congress is not in and of itself sufficient to vest jurisdiction in the Federal Courts."

II.

A federal question having been presented by the bill of complaint, it cannot be and has not been eliminated by the appellees' answer.

It was the purpose of the appellant to procure an adjudication upon the claim of title asserted by the appellant to the ore which they were engaged in extracting from the Pennsylvania ground. The appellees contested and disputed the appellant's ownership to the ore bodies in controversy. They asserted a right, based both upon the Johnstown and the Rarus patents. By so doing, they threw a doubt upon the appellant's title, which justified it in instituting a proper action to quiet its title and to procure an adjudication to the effect that the appellees had no right whatever, under any claim of title, to the appellee's property.

Such is the essential nature of the appellant's cause of action.

Gillis v. Downey, 85 Fed. Rep., 483.

The appellants therefore, had the absolute right to obtain an adjudication in this action as to the entire controversy existing between it and the appellees. It had the right to choose its own method for presenting that question. It was not bound to split up its cause of action into two parts, and to first litigate the validity of the appellee's claims based upon the Johnstown patent and then, in another suit, to procure an adjudication as to the validity of the appellees' claim based upon the Rarus patent.

If the appellees could force the appellant to try the question piecemeal, it would result in unnecessary litigation, which is contrary to public policy,

and a determination that they had no rights under the Johnstown patent would still render it necessary to ascertain whether they had any rights under the Rarus patent.

If the appellees should succeed in their novel practice, the appellant could be made the plaything of the Courts. Asserting the right to have a concrete proposition determined by the Federal Court, they would be told that the Court had been deprived of jurisdiction because the defendants had elected not to make any claim in *this* action founded upon any federal statute. Then upon their resorting to the State Court for redress, the appellees would at once defend both upon the Johnstown and Rarus patents, and require the appellant to litigate with respect to both in the tribunal of the defendant's choice.

Such a result is not to be tolerated. It savors too much of bad faith and jugglery.

We will now examine the appellees' arguments based on their answer more closely:

(*a*) The attempted disclaimer by the appellees that they make no claim of any rights under the Rarus patent in *this* action is a sham, and in no view of the case can it operate as an ouster of jurisdiction.

The so-called disclaimer, from beginning to end, is a series of evasions, of negatives pregnant, and of transparent attempts to deceive the Court into the belief that the appellants have abandoned all claim under the Rarus patent, while, in fact, they repeat with tiresome iteration that it is only in *this* action that they make no claim, unmistakably declaring it to be their purpose *that in some other action, in some other tribunal, of their own selection, it is their purpose to make the very claims which they wish this Court to ignore.*

To term the appellees' pleading a "disclaimer," is a misnomer.

In *1 Daniell's Chancery Pleading and Practice 6th Am. ed., 706*, the author says:

"A disclaimer is where a defendant denies that he has or claims any right to the thing in demand by the plaintiff's bill, and disclaims—that is, renounces—all claim thereto. Though a disclaimer is in substance distinct from an answer, yet it is in point of form an answer, containing simply an assertion that the defendant disclaims all right and title to the matter in demand. In order to entitle the defendant to be dismissed with costs, the disclaimer should state that the defendant does not and never did claim, and that he disclaims all right and title in the subject matter of the suit."

In *1 Beach, Modern Equity Practice, Sec. 282*, the author says:

"Pleadings in equity are founded on the purest principles of ethics, and especially in a disclaimer evasion and negatives pregnant will not be tolerated. Thus, where creditors sought to reach and subject the real estate of a deceased debtor, alleging that the defendants were heirs, a disclaimer denying to themselves all claim as 'the heirs' was deemed open to objection, for it not only left the defendants at liberty to claim as devisees, but if it were literally construed, it would be only an averment that they were not all the heirs."

Bentley v. Cowman, 6 Gill & Johnson, 152–154.

In *Story's Equity Pleading, 10th ed., Sec. 884 n.*, a form of a disclaimer is given as follows:

"This defendant saith that he doth not know that he, this defendant, to his knowledge or belief, ever had or did he claim or pretend to have, nor doth he now claim any right, title or interest

of, in, or to the estates and premises situate, etc., in the said complainant's bill set forth, or any part thereof; and this defendant doth disclaim all right, title, or interest in and to the said estate or premises in, etc., in the said complainant's bill mentioned, and every part thereof."

Being designed to operate as a release, the disclaimer must be signed by the defendant himself and his signature attested by some person competent to be a witness.

In *Dickerson v. Hodges, 43 N. J. Equity, 45*, Vice-Chancellor Van Fleet said:

"Such requirement is necessary for the protection of both parties, and simply puts such transactions occurring in the course of a suit on the same footing as like transactions occurring outside of a judicial proceeding."

In *6 Encyclopedia of Pleading and Practice, p. 738*, Title "*Disclaimer*," it is said:

"A disclaimer operates as an estoppel, and as between the parties and privies is an absolute bar to the further assertion of the right renounced, but it does not extend any farther than to the matter actually embraced in the disclaimer."

See *Mardes v. Meyers, 28 Southwestern Rep., 693.*

In *De Uprey v. De Uprey, 27 Cal., 329; s. c., 87 Am. Dec., 81*, it was held that a disclaimer contained in an answer, to be effective, must be absolute and unqualified. Less than this plaintiff is not bound to accept.

Chief Justice SANDERSON said:

"But it is argued, in support of the motion, that the pleadings show no cause of action as against Samuel De Uprey, because he disclaimed any interest in the land. Such, however, does not ap-

pear to be the fact. His answer does not contain an absolute unqualified disclaimer. Less than that the plaintiff was not bound to accept. He only disclaims all interest, except such as he may have under the homestead law, by virtue of the dedication of the land to homestead uses by himself and his wife. It may be that such interest did not amount to anything in law, but that was one of the questions which he had helped to make and which the plaintiff had a right to have determined and put to rest by the judgment of the Court. But be that as it may, he could not have claimed a dismissal of the action upon the ground of a disclaimer, unless he made that disclaimer in absolute and unconditional terms. Instead of doing that, he denied all the allegations of the complaint as to the plaintiff's title, pleaded two statutes of limitations, and averred title in his wife and claimed for himself a right of homestead in the premises, but disclaimed any further interest. It is a misnomer to call such an answer a disclaimer."

In *Prescott v. Hutchinson*, *13 Mass.*, *441*, the purpose and function of a disclaimer are clearly pointed out. It is treated as a bar to an action, "as it shows that he (the party disclaiming) had no right of action against the adverse party, either in this or any other form."

In *Oakham v. Hall*, *112 Mass.*, *534–539*, Mr. Justice WELLS says:

"A disclaimer is a renunciation of title and right of possession. If not falsified, it defeats the action, but the demandant is thereupon entitled to the possession of the land, and the party pleading the disclaimer is forever estopped by the judgment from denying his right of possession. If, however, the plea is falsified, the tenant is nevertheless bound by his disclaimer, and the demandant may have judgment against him. The judgment upon a disclaimer, whether for or against the demandant, is conclusive in his favor, upon title, as between the parties. It is sometimes said

to inure as a conveyance to the demandant of whatever title or right the party disclaiming had in the land."

Of course, where a disclaimer relates to one of several titles asserted by the party disclaiming, it merely operates as an estoppel against the assertion of the particular title thus disclaimed.

In *Tappan v. Boston Water Power Co., 157 Mass., 34–42*, it appeared that in a writ of entry the tenant filed a disclaimer as to a part of the demanded premises, and pleaded *nul disseisin* as to the other. The demandants did not discontinue the action as to the part disclaimed, but the trial proceeded upon the pleadings as they stood, and the Court found generally in favor of the tenant. The finding was reversed by the Appellate Court as to the part not included in the disclaimer. It was held that while the tenant was entitled to judgment upon the disclaimer, that did not give him title to the part disclaimed, Mr. Justice Morton saying:

"This decision gives it (the defendant) title to the parts disclaimed. The disclaimers are conclusive as between it and the demandants and their privies, as to the right and title of the demandants and the lands included in the disclaimers. If, therefore, the demandants eventually should succeed in also establishing the title to so much of the demanded premises as lies between the easterly channel and the thread of the stream, they will have established their title as between themselves and the tenant and its privies to all of the demanded premises that fall within the lines previously described."

The appellees will probably cite *Crystal Springs L. & W. Co. v. City of Los Angeles, 82 Fed. Rep., 114*, but that case is in no respect an authority for their contention. There was in that case an absolute disclaimer. Both parties claimed

under Mexican grants, confirmed and patented by the United States under the Treaty of Guadaloupe Hidalgo. The bill alleged, as the only ground of federal jurisdiction, that the defendant's claim of title was based in part on certain acts of the Legislature of California, which attempted to transfer to him the title held by the complainant's grantors at the time of the passage of these acts. The defendants in their answer not only denied this allegation, but also disclaimed in the following language:

"But, on the contrary, this defendant disclaims having acquired under any of said acts of the Legislature any right, if any, to the water flowing upon the surface or beneath it in the bed of said river, or any other water or right whatsoever, if any, which was at the time of the passage of said acts vested in the said Los Angeles City Water Company or its predecessor in interest, or in the predecessor in interest of said Crystal Springs Land and Water Company, or in any private individual or corporation, and this defendant denies that it claims or ever claimed under or by virtue of said acts of the Legislature, or any of them, the right to develop waters percolating in the bed of said river, etc."

In similar language, the defendant, in the most comprehensive and unambiguous form, disclaimed any rights based upon such acts of the legislature. The contrast of the language considered in the case cited with that contained in the defendant's answer sufficiently distinguishes the cases. Judge Wellborn said:

"While the disclaimer embraces what is thus suggested by defendants, it goes further and precludes the defendants, if there were rights vested in private persons at the passage of said acts of the legislature, from asserting title through said acts as against said vested right. Furthermore,

this suit is one to quiet title, and complains, for cause of action, alleged ownership of the property, defendant's claim thereto, and that said claim is unfounded. According to my previous rulings herein, the only ground of federal jurisdiction grows out of the altegations of the bill, that one of the claims of the defendant is that certain acts of the legislature of California attempted to transfer to it the title held by the complainants at the time of their passage, and that said acts, if construed as supporting such claim, are repugnant to the Constitution of the United States. Now, if the defendant claims for said acts no other effect that that they transferred to or continued in the city of Los Angeles as successor in law of the Mexican Pueblo of Los Angeles, only those rights which belonged to the latter, then those acts, if construed as supporting said claim, do not impair or effect any vested rights of complainants, and therefore, are not repugnant to the Constitution of the United States."

(*b*) The claim that, irrespective of the disclaimer, the denials of the answer, and the issues sought to be tendered by it, control the question of jurisdiction is likewise unsound.

It is elementary that jurisdiction depends upon the state of things existing when an action is brought. The right to sue and to invoke jurisdiction is anterior to the defense.

This was expressly decided in *Osborne v. Bank*, 9 *Wheaton*, 824, where Chief Justice Marshall said:

"The right to sue, if decided once, is decided forever; but the power of Congress was exercised antecedently to the first decision on that right, and if it was constitutional then, it cannot cease to be so, because the particular question is decided. It may be revived at the will of the party, and most probably would be renewed, were the tribunal to be changed. But the question respecting the right to make a particular contract, or to ac-

quire a particular property, or to sue on account of a particular injury, belongs to every particular case, and may be renewed in every case. The question forms an original ingredient in every cause. Whether it be in fact relied on or not, in the defense it is still a part of the cause, and may be relied on. The right of the plaintiff to sue cannot depend on the defense which the defendant may choose to set up. His right to sue is anterior to that defense, and must depend on the state of things when the action is brought. The questions which the case involves, then, must determine its character, whether those questions be made in the cause or not."

In *Sawyer v. Parish of Concordia*, 12 *Fed. Rep.*, 757-758, it was held that the jurisdiction of the Federal Courts cannot be vested or divested by the character of the defense made, but depends upon the issues raised by the plaintiff's petition and necessary to be determined to afford him adequate remedy. After citing the language just quoted, the Court said:

"Can his right to sue depend on anything else? If the jurisdiction depends on or could be ousted by the character of the defense, or was limited by the denials in defendant's answer—should he file one—or by the matters or facts he should choose to put at issue, then it is apparent that the ingenuity of counsel would have much to do with confirming or denying jurisdiction. If it depended on the jurisprudence of the said Courts on similar issues to those involved in the case at bar, the power of this Court to try such cases as this one would often rest on the opinions of the State Judges."

Numerous illustrations of the principle that jurisdiction depends upon the facts existing at the time of the commencement of the suit, and which are set forth in the bill of complaint or declaration, may be cited.

Thus, where jurisdiction is given by the amount of plaintiff's demand, it is not ousted because there is a verdict or judgment for less, or because the demand is reduced below the limit by offsets.

McKnight v. Ramsey, 1 Cranch C. C., 40.
Hulsecamp v. Teall, 2 Dallas, 358.
West v. Woods, 18 Fed. Rep., 665.
Schunk v. Moline Co., 147 U. S., 500.

So, also, jurisdiction is not lost by the complainant's change of residence subsequent to the filing of his bill or declaration.

Clark v. Matthewson, 2 Sumner, 262.
Connolly v. Taylor, 2 Peters, 556.
Morgan v. Morgan, 2 Wheaton, 297.
Ober v. Gallagher, 94 U. S., 199, 206.
Stewart v. Dunham, 115 U. S., 61, 64.
Phelps v. Oaks, 117 U. S., 236.

So where jurisdiction has been once given by the existence of diverse citizenship, it is not affected by a subsequent change of parties.

Hardenburgh v. Ray, 151 U. S., 112.
Wetherbee v. Stinson, 62 Fed. Rep., 173.

In *Mullin v. Torrence, 9 Wheaton, 535*, the Court said:

"It is quite clear that the jurisdiction of the Court depends upon the state of things at the time of the action brought, and that after vesting it cannot be ousted by subsequent events."

The appellees argue with much vigor that it is not within the power of the complainant to make the controversy. This is true, in so far as it is not within the power of any litigant to give a Court jurisdiction over an imaginary controversy, or over one which is manufactured for the fraudulent

purpose of creating jurisdiction where it would not otherwise exist. But it certainly is not true that a party is precluded from presenting an actual controversy, in reality existing and pending between him and another party. And it is likewise well established that where such controversy exists it is within the power of the complainant to present it for adjudication to any forum which has the constitutional or statutory right to take cognizance of it, and to shape his pleadings to that end.

Having thus exercised a legal right, he cannot be driven empty-handed, out of the court to which he has appealed for protection by a suggestion of the defendant that the latter does not desire to dispose of the entire controversy in an action brought for the determination of the whole and not of one aspect only of the existing conflict, which, although presenting several points of view, nevertheless consists of one entire and complete controversy.

In other words, the appellees' claim is, that because they choose to ignore an essential part of the controversy existing between the parties, that therefore a controversy other than that actually existing is presented for determination.

It is not understood that the appellees are willing to have an adjudication in this suit entered upon the records of the court that it has no rights in the ore in controversy, based upon the Rarus patent. If the appellant's right to such judgment were conceded, then something might be said in favor of the appellees' contention, although we by no means concede that jurisdiction is thereby ousted.

But, reserving to themselves the right to litigate all questions arising under the Rarus patent, in some other forum and at some other time, they

simply assert that because in their answer, after making various denials of the appellant's right to the ore in controversy, they plant themselves upon the Johnstown patent, the jurisdiction of the Court is to be determined, not by the cause of action stated in the bill of complaint, but by the issues which the defendant desires to substitute in place of those tendered by the appellant.

It is now conclusively settled that for purposes of jurisdiction of the Federal Court, both in the case where jurisdiction is originally invoked on the ground that the determination of the suit depends upon some question of a federal nature, as well as in cases where the case is removed from the State Court on that ground, the jurisdiction depends not upon the defenses interposed, but upon the case made by the declaration or bill of complaint.

State of Tenn. v. Union & Planters' Bank, 152 U. S., 454.

The appellees, however, insist that upon the interposition of their answer, there no longer was a subject matter of federal cognizance, because by such answer they terminated what might otherwise have been considered to be a controversy involving a construction of the statutes of the United States.

This is a mere play upon words. The subject matter in controversy between the parties was the ownership of certain ores in place, lying beneath the appellant's surface. The controversy was created by the claim of title made by the appellees, based upon the Rarus and Johnstown patents. The determination of that controversy involved a construction of an act of Congress. So long as the appellees do not concede that they have no right to this property, under the Rarus

patent, so long does the controversy described in the bill of complaint continue, and so long does federal jurisdiction attach, however much the appellees may desire the courts to lose sight of the actual point in dispute, by a cunning attempt to disguise the actual controversy.

Much stress is laid on the case of *Robinson v. Anderson*, *121 U. S., 522*, but that case has no application here. There an action was brought for the possession of lands under a Mexican grant. The plaintiff alleged that the several defendants claimed to be the owners of part of the estate overlapping that of the plaintiff, and that, if that were the case, the title of the defendants, being older, was asserted to have preference. Plaintiff further alleged that the defendants claimed that they were third persons, as to whom the patents granted to the plaintiff were not conclusive under an act of Congress. Many of the defendants answered, denying that they were in possession of any portion of the premises in dispute, others claiming that they were in possession with the consent of the plaintiff and not otherwise; others claimed to be in possession in severalty by virtue of written contracts for the conveyance of the several tracts of land by the plaintiff to the defendants. None of the defendants, in their answer, claimed title under the grant of the so-called overlapping estate. The complaint was in such form that it was very doubtful whether, standing by itself, it made out any case of jurisdiction.

The true ground of that decision is stated by Chief Justice WAITE as follows:

"The Circuit Court cannot be required to keep jurisdiction of a suit, simply because the averment in a complaint or declaration make a case arising under the constitution, laws, or treaties of the

United States, if when all the pleadings are in it appears that these averments are immaterial in the determination of the matter really in dispute between the parties, and especially if, as here, they were evidently made for the purpose of creating a case cognizable by the Circuit Court when none in fact existed. The provision of Section 5 of the Act of 1875, requiring the Circuit Court to proceed no further, but dismiss the suit when it satisfactorily appears that such suit does not really and substantially involve a dispute or controversy properly within its jurisdiction, applies directly to this case as it stands on the pleadings. The answers show that the case made by the complainant was fictitious and not real. The defendants either disclaim all interest in the land, or claim title under and not adverse to that of the plaintiff."

The fair construction of this language clearly indicates the ground of decision. It was not that the answer determined whether a case was of federal cognizance or not, but that all the pleadings in the case then under consideration indicated it to be an indisputable fact that the case made by the complainant was fictitious and not real; that it was a fraudulent attempt to confer jurisdiction where none existed; that there was not in reality any dispute between the parties which required a consideration of congressional legislation.

On the other hand, in the present case, the appellant's good faith is not only indicated by the entire history of this litigation, but by the very answer itself. The actual controversy between the parties does involve a construction of the mining laws. The case made out by the complainant is not fictitious. The appellees have not disclaimed an interest in the property in question under the Rarus patent. They in reality claim title adversely to that of the complainant, and their answer is such a mass of evasions that it is demonstrated that while they admit the existence of the very

controversy described in the bill of complaint, they are studiously attempting to transfer its determination to another forum.

III.

It is submitted that the decree of the Circuit Court of the United States for the District of Montana should be reversed, and the cause remanded to that Court with instructions to proceed therewith.

LOUIS MARSHALL,
JOHN F. FORBIS,
Appellants Counsel.

DEC 1 1902
JAMES H. McKENNEY,
Clerk.

No. 103.
Reply Brf. of Marshall for Appt.

Supreme Court of the United States.

OCTOBER TERM, 1902.

Filed Dec. 1, 1902.

No. 103.

THE BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING COMPANY,
Appellant,

vs.

THE MONTANA ORE PURCHASING COMPANY, P. AUGUSTUS HEINZE and ARTHUR P. HEINZE,
Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

APPELLANT'S BRIEF IN REPLY.

LOUIS MARSHALL,
JOHN F. FORBIS,
Appellant's Counsel.

C. D. Rosenfeld, Walker and Cedar Streets, N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1902.

No. 163.

BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING COMPANY,

Appellant,

AGAINST

MONTANA ORE PURCHASING COMPANY, F. AUGUSTUS HEINZE and ARTHUR P. HEINZE,

Appellees.

APPELLANT'S BRIEF IN REPLY.

The appellees have moved (1) for a writ of *certiorari* for the amendment of the record, and (2) for the dismissal or affirmance of the appeal herein, the latter motion being based on three grounds :

FIRST. Because this appeal was not taken from the final judgment of the Circuit Court for the Ninth Circuit District of Montana.

SECOND. Because by this appeal it is sought to review the judgment of the United States Circuit Court of Appeals, Ninth Circuit. made and entered in this cause.

THIRD. Because there is no Federal question involved herein.

These several motions and the arguments made in support thereof by the appellees will now be considered.

FIRST.

The motion for a writ of certiorari.

(a) The appellees have not brought this motion within the rule of this Court regulating motions of this character.

The appeal herein was taken on March 15th, 1901, and the solicitors for the appellees on that day acknowledged service of copies of the assignments of error, petition of appeal, and citation on appeal (Record, pp. 52–56). The transcript of record herein was filed in this Court on May 21st, 1901, and the cause appeared on the docket of the October Term, 1901, as No. 329. The record was printed at about the opening of that term.

No motion of any kind was made or filed on behalf of the appellees for the amendment of the record until November 10th, 1902, after this cause had appeared on the docket of the present term, and on the very eve of the argument herein.

Rule 14, of the Rules of the Supreme Court, provides :

" No *certiorari* for diminution of the record will be hereafter awarded in any case unless a motion therefor shall be made in writing and the facts on which the same is founded shall, if not admitted by the other

party, be verified by affidavit. And all motions for such *certiorari* must be made at the first term of the entry of the case; otherwise the same will not be granted unless upon special cause shown to the court accounting satisfactorily for the delay."

The condition of this rule has not been complied with. No special cause is shown accounting for the delay. The affidavit of the solicitor for the appellees, upon which this motion is based, shows that at the time when the defendant presented its bill of exceptions—which was in March, 1901—the Court declined to include the mandate referred to in the affidavit, in the bill of exceptions, although the solicitor asserts that at the time he insisted and requested the Court to do so.

In *Chappell vs. United States (160 U. S., 506)*, Mr. Justice GRAY said of a similar motion:

"The motion for a writ of *certiorari* for diminution of the record in not stating that on July 15, 1890, the plaintiff in error filed a petition for the allowance of a writ of error from the Circuit Court of the United States to the District Court in which the proceedings were pending, must be denied for several reasons: 1st. The motion was not made at the First Term, as required by Rule 14 of this court, and no satisfactory cause is shown for the delay."

(b) The writ of mandate alone is not sufficient to indicate the nature of the appeal on the decision of which it was issued.

The writ, which constitutes a part of the moving papers, refers to an order for a temporary or interlocutory injunction, which is of record in the office of the Clerk of the Circuit Court of the United States for the District of Montana, Southern Division, "to which record reference is hereby made and the same is hereby

expressly made a part hereof." It also refers to the transcript of the record of the Circuit Court which was brought into the Circuit Court of Appeals for the Ninth Circuit.

In order, therefore, to understand the nature of the proceedings which resulted in the mandate, and the effect of the mandate, it is necessary to have before the Court the transcript of the record which was brought into the Circuit Court of Appeals and of the order for the temporary or interlocutory injunction, to which reference was made in and which were expressly made a part of the mandate. Without them the mandate is unintelligible and does not present to this Court sufficient facts on which to base any determination.

SECOND.

The Motion to Dismiss the Appeal.

(1) There is no merit in the proposition that the appeal herein is not taken from a final judgment of the Circuit Court for the Ninth Circuit, District of Montana.

(a) The record shows that on March 29, 1899, a decree was entered dismissing the amended bill, with costs to the defendants (Rec., p. 34).

(b) The certificate as to the existence of the question of jurisdiction shows that a decree was rendered by the Circuit Court of the United States for the Ninth Circuit dismissing the amended bill of complaint (Rec., pp. 35–51).

(c) The order allowing the appeal shows that such final decree was rendered (Rec., p. 54).

(11) There is no support for the claim that by this appeal it is sought to review the decree of the United States Circuit Court of Appeals for the Ninth Circuit, or that the decree of the Circuit Court dismissing the bill of complaint for want of jurisdiction is not reviewable.

(1) The record before this Court does not show that this appeal seeks to review any action of the United States Circuit Court of Appeals.

(2) On the contrary, the bill of exceptions and the certificate on the question of jurisdiction both show that the cause came on for hearing on the application of the defendant to dismiss this action, upon the ground and for the reason that there was no Federal question presented by the allegations in the plaintiff's amended complaint and the defendant's answer thereto, and that such application having been submitted to and duly considered by the Court, the Court rendered its decision sustaining the application to dismiss, upon the ground and for the reason that the Court had no jurisdiction of the action (Rec., pp. 34, 35).

(3) Assuming, however, that a mandate was issued by the United States Circuit Court of Appeals on the decision of an appeal by the defendants from an interlocutory injunction order, by the terms of which the order appealed from was reversed and the cause remanded to the Circuit Court with instructions to dismiss the amended bill for want of jurisdiction, that fact does not debar an appeal to this Court on the question of jurisdiction from the decree of the Circuit Court dismissing the action for want of jurisdiction.

(a) The appeal to the Circuit Court of Appeals was taken by the *defendants* herein and *not* by the *present appellant*, from an order granting the latter a temporary injunction. Such an appeal was proper for the purpose of reviewing the interlocutory order pursuant to the provisions of the *Evarts Act*, and on such an appeal that Court had the power to affirm or reverse the order appealed from. The present appellant could not have prevented the taking of such an appeal nor could it question the jurisdiction of the Circuit Court of Appeals to review the injunction order appealed from.

(b) It was not within the power of the present appellant on the granting of the temporary injunction to procure a review here of the jurisdictional question in this cause by a certification from the Circuit Court to this Court, because the injunction order was issued in its favor, and there was nothing, therefore, for this appellant to review; while the defendants could not be prevented from taking an appeal to the Circuit Court of Appeals in order there to review all the questions presented by the order granting the temporary injunction and by the record on which it was based.

(c) After the order of the Circuit Court of Appeals reversing the temporary injunction order had been granted the question of jurisdiction could not be certified from that Court to this Court, since the Evarts Act clearly refers to a certification by the Circuit Court alone. Neither could an appeal be taken to this Court from the order of reversal since it was not a final judgment or decree.

(d) Assuming that an application for a writ of *certiorari* might have been made to this Court for leave to review the order of the Circuit Court of Appeals reversing the temporary injunction, the granting of such

an application rested solely in the discretion of this Court, and, the question presented not being one of such a character as would have warranted the granting of a writ under the rules appertaining to applications therefor, which have been laid down by this Court, and the decision of the Circuit Court of Appeals being based on an interlocutory order, would unquestionably have been denied.

2 Foster's Fed. Pr., 3d ed. p. 1178.

(e) Unless, therefore, the question of jurisdiction arising in this cause can be reviewed on the certificate of the Circuit Court after a dismissal of the bill of complaint on the ground of want of jurisdiction subsequent to the reversal of the order granting the temporary injunction, the appellant would be deprived of the right to a review by this Court of the question of jurisdiction, although the underlying theory of the Evarts Act is to make all questions of jurisdiction the subject of review by this Court as of right to the exclusion of the Circuit Court of Appeals.

(f) This is not a case where the present appellant has sought to take two appeals for the purpose of obtaining adjudication on the question of jurisdiction involved in this cause. The appeal to the Circuit Court of Appeals was taken by defendants against the will of this appellant. The present appeal was taken by the appellant directly to this Court at the first opportunity that was presented to it to review the jurisdictional question involved.

(g) For these reasons the case does not fall within the rule of *Robinson vs. Caldwell (165 U. S., 359)* and *Carter vs. Roberts (177 U. S., 496)*. In both of those cases an attempt was made by the party defeated in

the Circuit Court to take independent appeals both to this Court and to the Circuit Court of Appeals. Such procedure was very properly criticised.

(h) Neither does this case fall within any of the classes considered in *United States vs. Jahn (155 U. S., 109, 114)*, in which the practice relative to the review of the jurisdiction of the Circuit Courts was considered. Such a situation as that which is here presented was not adverted to nor was it intended to define every possible category.

(i) Neither is the decision in *Howard vs. United States (184 U. S., 680)* applicable here. There an appeal was taken to this Court from a judgment of the Circuit Court of Appeals affirming a judgment of the Circuit Court. Jurisdiction was invoked both on the ground of diverse citizenship and on the existence of a Federal question. It was held that the judgment of the Circuit Court of Appeals was not "final" within the meaning of the *Evarts Act*, although it was a "final" judgment from which a writ of error could be sued out.

Here, there is no question as to the "finality" of the decision of the Circuit Court of Appeals within the meaning of the Evarts Act; but it requires no argument to show that the order of that Court reversing the injunction order herein and remanding the proceedings to the Circuit Court was not such a "final judgment or decree" as could be made the basis of a writ of error.

Keystone Manganese & Iron Co. vs. Martin, 132 U. S., 91, and cases cited.
American Construction Co. vs. Jacksonville Ry. Co., 148 U. S., 384, 385.

(j) This is not a case falling within the decision of

Aspen Mining & Smelting Co. vs. Billings (150 U. S., 31). There, after a final hearing on the pleadings in the Circuit Court of the United States for the District of Colorado, the bill of complaint was dismissed. An appeal was taken from the decree to the Circuit Court of Appeals, which reversed the decree of the Circuit Court and directed that Court to take further proceedings and to enter a decree in conformity with the opinion rendered. An application was made to this Court for a writ of *certiorari* under Section 6 of the Act of March 13, 1891, and was denied. Prior to the taking of the appeal to the Circuit Court of Appeals an appeal had been allowed to this Court, but subsequently on the prayer of the complainant and before the appeal had been perfected, an order was entered which vacated the allowance of an appeal to this Court and allowing an appeal to the Circuit Court of Appeals. After the reversal by the Circuit Court of Appeals the defendants objected to the jurisdiction of the Circuit Court to proceed further because of the previous vacated allowance of an appeal to this Court, and procured a certification of the question of the jurisdiction of the Circuit Court to proceed further in the cause.

Clearly that case does not present the same conditions as the present. There the complainant was the defeated party in the Circuit Court, and successful in the Circuit Court of Appeals in a case which undoubtedly could not have been taken directly to this court.

This is demonstrated by the opinions of the Circuit Court of Appeals in *51 Fed. Rep., 338*, and *52 Fed. Rep., 250*. They disclose that there was absolutely no question of jurisdiction in the case, and hence that it was

not one which could have been taken directly from the Circuit Court to this Court. That fact was emphasized by the application for a writ of *certiorari* after the decision by the Circuit Court of Appeals. The decree there appealed from was reversed and the cause remanded to the Circuit Court with instructions to permit another party to join as complainant, to require another party to be made defendant, and thereafter to enter a decree canceling certain deeds and directing an accounting between the parties.

When this Court came to consider the appeal which was taken to it, the merits and regularity of the procedure of the Circuit Court were passed upon. After a result had been reached adversely to the appellant, it was further decided that under the circumstances disclosed the decree of the Circuit Court in conformity with the mandate of the Circuit Court of Appeals was not reviewable here.

The differences between that case and the present are thus manifest. There, every issue in the case was reviewed by the Circuit Court of Appeals after final decree, and there was no question which was reviewable in this Court except as brought up by writ of *certiorari*, which, when applied for, was refused. Here the Circuit Court of Appeals had only jurisdiction to review the interlocutory injunction order, and unless this appeal is entertained the present appellant would be deprived of its statutory right to have the question of jurisdiction arising in this cause determined by this Court.

(k) The cases of *Stewart vs. Solomon (97 U. S., 360)*, *Texas & Pacific Ry. Co. vs. Anderson (149 U. S., 237)*, and *In re Sanford Fork & Tool Co. (160 U. S., 247)* have no application here. In each of them, after a

final decision by this Court and a remand to the Circuit Court, it was attempted to review the judgment of the Circuit Court in execution of a mandate of this Court by further appeal.

No such attempt is made here. What the appellant seeks to accomplish is to have his day in this Court on the question of jurisdiction, which he would lose, without any fault of his own, unless the question of jurisdiction certified by the Circuit Court is considered on this appeal.

III. *As has been shown in our main brief, a Federal question is involved herein which gave to the Circuit Court of the United States jurisdiction over this cause.*

Without repeating the argument contained in the brief heretofore filed on behalf of the appellant, a few of the statements made by the appellees will be briefly considered.

1. It is urged that treating this suit as one to quiet title, it is not maintainable, because the complainant did not allege that it was in possession of the premises in controversy.

(a) It may be premised that this appeal is not one which involves the question of the sufficiency of the bill of complaint as a pleading. It involves nothing but a question of jurisdiction, and its determination is solely on the proposition as to whether or not the statement of the complainants' case presents one or more Federal questions. Whether or not the pleading is good as a bill to quiet title is unimportant, so long as its purpose is to quiet the complainants' title.

(b) An examination of the bill of complaint will, however, indicate that as a bill to quiet title it is well pleaded.

It shows that the gravamen of its allegations are that the complainant is the owner and entitled to possession of certain premises described; that the defendants wrongfully entered upon and extracted ore therefrom which belonged to the complainant, and that unless the defendants are enjoined and restrained from mining and extracting the ores, the complainant would be required to bring numerous actions for the ascertainment of damages sustained, and would suffer irreparable injury; that the defendants claim to be the owners of the veins from which the ore had been extracted, and, therefore, the nature of their claims is described and the character of the Federal questions arising out of the controversy are defined.

The property which is the subject of this controversy is located in Montana. *Section 1310 of the Code of Civil Procedure* of that State provides:

"An action may be brought by *any* person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claim."

While under the *Judiciary Act of 1789*, suits in equity are not maintainable in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law, it is an elementary principle that where a plaintiff complains of a trespass of a continuing nature so that redress at law would require a multiplicity of actions, the remedy at law would not be so adequate as that afforded by a court of equity.

Holland vs. Challen, 110 U. S., 15, 26.
United States vs. Wilson, 118 U. S., 689.
Frost vs. Spickley, 121 U. S., 552.

(c) Irrespective of the statutory provision of the Montana Code, the right to maintain an action of this character in order to prevent a multiplicity of suits, falls under one of the well recognized heads of equity jurisprudence, and has been recognized in many mining cases.

Erhardt vs. Boaro, 113 U. S., 537
Waterloo Mining Co. vs. Doe, 82 Fed, 45.

Jurisdiction over proceedings to quiet title and to prevent litigation is inherent in courts of equity, and although the courts have imposed limitations upon its exercise, it is always competent for the legislative power to remove these restrictions. Accordingly, it has been held that statutory enactments such as have been passed by Kentucky, Nebraska, Wisconsin and Indiana to the effect that any one, whether in actual possession or not, claiming title to real estate, may bring an action against any adverse claimant for the purpose of quieting his title, enlarge but do not change the character of the epuitable rights of persons claiming title to real property, and that a Federal Court sitting in such a State as a court of equity has jurisdiction to give the relief accorded by the statute.

Holland vs. Challen, 110 U. S., 15.
Reynolds vs. Crawfordsvile Bank, 112 U. S., 405.
Barden vs. Land & River Improvement Co., 157 U. S., 327.
Clark vs. Smith, 13 Peters, 195.

(d) Reading the bill of complaint according to its fair import, it is clear that the complainant showed that it was not only entitled to the possession of the premises on which the repeated trespasses were com-

mitted, but that it was in possession of such premises, the defendants' interference with such possession being restricted to their entry upon the premises described by underground workings (Rec., p. 4).

In *Simmons Creek Coal Co. vs. Doran, 142 U. S., 417*, it was held that the commission of a trespass on real estate and the commission of acts of waste upon it, do not constitute a possession which in itself would drive the owner to an action of ejectment and prevent him from filing a bill *quia timet.*

The case does not, therefore, fall within the principle of *California Oil & Gas Co. vs. Miller* (96 Fed. Rep., 12) and the other cases cited on pages 11 and 12 of the appellees' points.

2. The appellant does not question the authority of *Tennessee vs. Union and Planters Bank (152 U. S., 154), Blackburn vs. Portland Gold Mining Co. (175 U. S., 571)*, and the other authorities cited on pages 13-16 of the appellees' points.

The question here involved is not as to the rule of law, but as to whether the decisions referred to apply to the facts alleged in the bill of complaint; whether or not the statement of the appellant's cause of action presents a federal question.

3. It is not true that every question which could possibly arise under the issues raised by the pleadings was passed upon or determined by this Court prior to the filing of the amended complaint herein.

(a) The case of *Del Monte M. & M. Co. vs. Last Chance Mining Co. (171 U. S., 55)* was not decided until May 23, 1898. The amended bill of complaint herein was filed on March 28, 1898 (Rec., p. 1).

(b) The question as to the burden of proof in cases of trespass upon mining claims, which is discussed on

page 21 of the appellee's brief, is an open one in view of the decision of Judge KNOWLES in *Montana Co. vs. Clark (42 Fed. Rep., 626).*

(c) The effect of a divided apex is likewise an open question.

(d) The proposition considered in *Montana Ore Purchasing Co. vs. Boston & Montana Co., 20 Mont., 336,* and which is one of the important controversies between these parties, has never been passed upon by this Court.

4. The effect of the appellees' attempted disclaimer and of the decision in *Robinson vs. Anderson (121 U. S., 522)* has been sufficiently considered under the appellant's second point.

5. The criticisms upon the appellant's brief, which appear on pages 24–28 of the appellees' brief, are answered by the printed argument submitted by the latter to the United States Court of Appeals on the appeal the decision of which is reported in 85 Fed. Rep., at page 867.

Respectfully submitted,

LOUIS MARSHALL,
JOHN F. FORBIS,
Counsel for Appellant.

The Supreme Court of the United States.

OCTOBER TERM, 1902.

NO. 103.

THE BOSTON & MONTANA CONSOLIDATED COPPER AND SILVER MINING COMPANY,
Appellant,

vs.

THE MONTANA ORE PURCHASING COMPANY, F. AUGUSTUS HEINZE AND ARTHUR P. HEINZE,
Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, NINTH CIRCUIT, DISTRICT OF MONTANA.

BRIEF AND ARGUMENT FOR APPELLEES.

I.

STATEMENT.

The appellant, in its statement, has included many things entirely foreign to this appeal—matters which, if they exist at all, are not brought be-

fore this Court, and cannot be considered by it on this appeal. We do not conceive any proper purpose for the appellant's counsel setting them forth, or making a contention regarding them, or attempting to draw inferences from them. They are disposed of by the statement that they do not exist in this case and have no place before the Court. This Court can only know, from the proper record presented to it, what has taken place in the case, and what, if any, question of right is presented by the appeal. We therefore dismiss all references made by appellant's counsel to what they claim was the position and argument of appellees' counsel at one time before the Circuit Court or the United States Circuit Court of Appeals, as being unworthy of any further notice.

It might have occurred to counsel who prepared the brief for appellant that they were not in anywise discharging their duty towards this Court by a reference to some matters claimed by them to have taken place or existed, but, since it did not, we beg to state, without admitting that any such matters as they refer to ever had any existence or are true, that it is a rule so thoroughly well established as being no longer open to discussion that parties cannot, either by their conduct or consent, give jurisdiction to a Circuit Court of the United States in a case where otherwise no such jurisdiction existed.

Counsel for appellant have also misstated the

case. A true statement with reference to the position of the appellees before the Circuit Court and the United States Circuit Court of Appeals would have disclosed that, upon the appearance of appellees herein to the original bill of complaint, they filed a demurrer thereto, upon the following grounds:

First. That the Court was without any jurisdiction to hear or determine the matter, for the reason that it appeared from the bill of complaint that there was no federal question involved herein.

Second. That the complainant had not by said bill made or stated such a case as did or ought to entitle it to any relief against the defendants.

This demurrer was overruled by the Circuit Court, and was included in the record when the case was presented to the United States Circuit Court of Appeals, and before it when it rendered its judgment and decision in this case (which is reported in *85 Federal Reporter, page 867*).

Appellant seeks to make it appear that after said decision by the United States Circuit Court of Appeals an amended bill of complaint was filed in the Circuit Court, in accordance with the suggestion of the United States Circuit Court of Appeals, and that it was upon said amended complaint that the appellees applied to the Circuit Court to dismiss the action. (This is stated on pages 9 and 10 of appellant's brief.) What appellant expected to gain by such a statement we do not know. The

fact is that, upon said amended complaint being filed, the appellees herein filed their answer thereto, and then made a motion, based upon the complaint and answer, to the Circuit Court to dismiss the suit. This was overruled, and, upon a hearing had, the Circuit Court granted an injunction against the defendants in the case, who thereupon took an appeal to the United States Circuit Court of Appeals, presenting to it the amended complaint and answer and all matters which had taken place in the Circuit Court upon said application for an injunction, together with the order of injunction entered by the Circuit Court. The case as thus presented came on for hearing before the United States Circuit Court of Appeals. The appellees herein, who were the appellants in that cause, contended that the amended bill of complaint did not show any jurisdiction in the Circuit Court, and that if it could be construed to have shown any such jurisdiction, the jurisdiction was defeated by the matters set for in the answer. The Court, after full argument, rendered its opinion and judgment in the matter, holding that the Circuit Court had no jurisdiction, and ordering the suit dismissed. *(Montana Ore Purchasing Co. et al. vs. Boston & Montana Consolidated Copper and Silver Mining Co., 93 Fed. Rep. 274.)*

The mandate was filed in the Circuit Court, but is not included in the printed record herein. Upon this mandate, presented by appellees herein, the

Circuit Court made and entered its decree, dismissing the cause in conformity therewith. This appears from the decree itself. (Record, page 34.) This is, therefore, not the decree of the Circuit Court, but simply the recognition of the mandate from the United States Circuit Court of Appeals, which had the effect, in itself, of dismissing the cause, and the action of the Circuit Court in conforming to this mandate was simply ministerial. It did not call for the exercise of any judicial determination or authority.

We have, then, in the case an attempted appeal, not from any judgment or decree of the United States Circuit Court, but from the decree of the United States Circuit Court of Appeals. There can, it seems, be no question but that the appellant had a right to appeal from the decree of the United States Circuit Court of Appeals at any time within one year after the rendition thereof, but no such appeal was prosecuted, and this appeal cannot be maintained therefrom.

With this statement of the case, which is in accord with the facts, we believe there will be no difficulty in this Court arriving at a determination to dismiss the appeal.

II.

THE MOTION TO DISMISS THE APPEAL.

ARGUMENT AND AUTHORITIES.

The appellees have filed herein their motion to dismiss the appeal on the following grounds:

First. Because the appeal is not taken from a final judgment of the Circuit Court, Ninth Circuit, District of Montana.

Second. Because by this appeal it is sought to review the decree of the United States Circuit Court of Appeals, Ninth Circuit.

Third. Because there was, and is, no federal question involved herein, and because the United States Circuit Court did not have jurisdiction.

The first two grounds of the motion may be considered together, since, if the judgment sought to be reviewed is that of the United States Circuit Court of Appeals, it cannot be the judgment of the United States Circuit Court. That it is the judgment of the United States Circuit Court of Appeals, and consequently that this appeal must be dismissed, has already been decided by this Court.

Board of Com. of Tippecanoe Co. vs. Lucas, 93 U. S. 108;

Mower vs. Fletcher, 114 U. S. 127;

Stewart vs. Salamon, 97 U. S. 361;

Kimpton vs. Jubilee Placer Min. Co. 22 Montana, 107.

No rule is better settled than that an appeal from a decree entered by the court below in accordance with the mandate of the appellate court cannot be maintained.

Aspen Mining & Smelting Co. vs. Billings, 150 U. S. 31; 14 Sup. Ct. Rep. 4.

See, also, to the same effect and as fully supporting the motion to dismiss, the following cases:

Bates' Federal Equity Practice, Sec. 841;

Merrill vs. National Bank, 78 Fed. 208;

Bissell Carpet-Sweeper Co. vs. Goshen Sweeper Co., 72 Fed. 545;

Central Trust Co. vs. Evans, 73 Fed. 562;

Texas & P. R. Co. vs. Anderson, 149 U. S. 235;

Re Sanford Fork & Tool Co., 160 U. S. 246; 16 Sup. Ct. Rep. 291.

There was an appeal to the United States Circuit Court of Appeals from the decision of the Circuit Court.

The United States Circuit Court of Appeals had authority to decide the case as presented to it.

Smith vs. Iron Works, 165 U. S. 518; 17 Sup. Ct. Rep. 407;

Mast, Foos & Co. vs. Stover Mfg. Co. 20 Sup. Ct. Rep. 708 at 712;

Castner vs. Coffman, 20 Sup. Ct. Rep. 842.

If the decision of the United States Circuit Court of Appeals was erroneous, then, under the appellant's view of this case, and under the statute, it would have had a right to appeal therefrom to this Court. The question of whether or not jurisdiction existed in the United States Circuit Court depended, not upon diverse citizenship, but upon whether or not a federal question was involved. In such a case the decision of the United States Circuit Court of Appeals is not final, in the sense that an appeal cannot be taken therefrom to this Court. The appellant here is contending that a federal question was involved, and that the United States Circuit Court had jurisdiction on that account. It needs no argument, therefore, to point out that unless an appeal was taken from the judgment of the United States Circuit Court of Appeals within the time allowed by the statute that said judgment became final.

Howard vs. United States, 22 Sup. Ct. Rep. 543, at 545-546.

Of course, we are not to be understood as saying that upon the case being brought in the state court

and tried therein, if there should arise in the trial of the case a federal question, necessary for decision and which should be decided by the state court, that any jurisdiction which this Court would have by appeal from the final judgment of the highest tribunal of the state would be destroyed. Whether or not there would be such an appeal is not a question involved in this case. We have, under the condition of the case, a final judgment of the Circuit Court of Appeals on the question of jurisdiction, unappealed from, and an attempt to review the same by the effort made in this case to bring it before this Court on the claim of an appeal from a final judgment of the Circuit Court.

The two grounds which we present for the dismissal of this appeal are amply supported by both reason and authority, and we therefore ask for its dismissal.

III.

The third ground of the motion is likewise well sustained. It will be observed, from a reading of the amended complaint (Record, page 1), that in so far as under the rule of good pleading the complainant attempts to state a cause of action, its allegations upon the following points are the only material or necessary ones:

First. That the complainant was a corporation.

Second. That the defendant Montana Ore Purchasing Company was a corporation.

Third. That the complainant was the owner and entitled to the possession of the premises described in the complaint.

Fourth. That the defendant without right entered into the same and extracted ores therefrom, without the consent of the complainant, and the value of the said ores.

Fifth. That the defendant was continuing and threatened to continue the extraction of such ores, and to repeat said entry; that the complainant had no means of knowing the amount or value of the ores which would be extracted, and would be obliged to bring a multiplicity of suits; and that the premises were valuable chiefly for the ores therein contained.

These allegations in nowise presented a federal question. It is shown by the complaint that the defendants were in the *possession* of the premises and engaged in mining ores. It is not alleged in the complaint *that the complainant was in possession,* and this presents at the outset the question of whether or not the Circuit Court had any jurisdiction. The action is claimed to be one in equity for an injunction. It is not alleged in the action at law that the complainant was in the possession. Did, then, the Circuit Court, upon the allegations of this amended complaint, have jurisdiction, or

did the fact that the defendants were in possession and that the plaintiff did not allege that it was in possession, deprive the Court of any jurisdiction which it otherwise might have had? It is quite a general rule with reference to actions brought on the equity side of the United States Circuit Court for the purpose of quieting title that they cannot be maintained unless the complainant is, at the time the action is brought, in the possession of the premises. This seems to be upon the theory that the complainant is seeking equitable relief. If the rule is to be applied in all actions in which the complainant seeks equitable relief—and it would seem in reason that it should be—then the Circuit Court did not have jurisdiction by reason of the fact that the complainant was not in possession, and that it did not allege in its complaint that it was in the possession of the premises. (The appellant, in its brief, p. 21, says that the case is, in effect, one to quiet title.)

We refer the Court on this point to the following authorities and the cases therein cited:

Cosmos Exploration Co. vs. Gray Eagle Co., 112 Fed. 4;

United States Min. Co. vs. Lawson, 115 Fed. 1005.

See also:

California Oil and Gas Co. vs. Miller, 96 Fed. 12.

There is no federal question involved in this case or shown by the complaint. If the Court upon examination finds that there is no federal question involved here, then this appeal should be dismissed, since it is necessary that it should be made to appear that there is a federal question involved before it can be concluded that it has any jurisdiction to entertain or consider the appeal. This is purely an action to recover damages for trespass of a portion of a mining claim in which the complaint fails to show any possession on the part of the complainant, and does show possession on the part of the defendants. So far as the complaint is concerned in its statement of a cause of action, it appears that any questions which might arise would be simply questions of fact, and this is true, even if the allegations contained in the complaint for the purpose of attempting to give the Court jurisdiction were proper to be considered.

California Oil & Gas Co. vs. Miller, 96 Fed. 12;

Dewey Mining Co. vs. Miller et al., 96 Fed. 1.

In *California Oil and Gas Co. vs. Miller, supra, p. 21,* it is said:

"Eliminating from the bill in the case at bar all allegations relative to the claims and contentions of the defendants, there remain only allegations of the sources of complainant's ownership; and it is manifest that these allegations alone do

not show any dispute between the parties as to the meaning of a federal law. Indeed, the simple statement by plaintiff of his claim can seldom present a federal question, for the reason that a dispute as to the meaning of a federal law, or in regard to any other matter, can arise only when there are conflicting claims of two or more parties, and not out of the mere presentation of the claim of one party."

The controversy must be a real and substantial one; a mere claim in words is not enough.

Lampasas vs. Bell, 21 Sup. Ct. Rep. 368;

Florida Central & P. R. Co. vs. Bell, 20 Sup. Ct. Rep. 399;

McCain vs. Des Moines, 19 Sup. Ct. Rep. 644.

In the suit to quiet title to a mining claim, the fact that the defendant claims under a location does not raise a federal question.

DeLamar's Nevada Gold Ming. Co. vs. Nesbitt, 20 Sup. Ct. Rep. 715.

Trespass on a mining claim does not present or involve a federal question.

Peabody Gold Mining Co. vs. Gold Hill Mng. Co., 97 Fed. 657;

Mining Co. vs. Kennedy, 84 Fed. 2 and 3.

The complaint in its statement of a cause of action must present a federal question.

Tennessee vs. Union & Planters' Bank, 152 U. S., 454;

Postal Telegraph Cable Co. vs. Alabama, 155 U. S. 482;

Oregon, etc., Ry. Co. vs. Skottowe, 162 U. S. 495;

Galveston, etc., Ry. Co. vs. Texas, 170 U. S. 226; 18 Sup. Ct. Rep. 603;

Florida Central & P. Ry. Co. vs. Bell, 20 Sup. Ct. Rep. 399-403.

The question of jurisdiction cannot be waived.

Mexican National R. Co. vs. Davidson, 15 Sup. Ct. Rep. 563.

A federal question is not involved so as to give the Circuit Court jurisdiction, because in the course of the litigation it may become necessary to give a construction to the Constitution or some law of the United States.

Wise vs. Nixon, 78 Fed. 203;

Water Co. vs. Keyes, 96 U. S., 199-203.

It must appear from plaintiffs' statement of his cause of action.

M. O. P. Co. vs. B. & M. Co. 93 Fed. 274;

Florida Central & P. R. Co. vs. Bell, 20 Sup. Ct. Rep. 399.

Abstract questions of law are not to be consid-

ered unless it appears from the statement of facts constituting the cause of action that they are such as to make them material and necessary for a decision of the case.

N. Y. L. E. & W. R. R. Co. vs. Madison, 123 U. S. 524.

A claim to land under a patent from the United States does not present a federal question.

Florida Cent. & P. R. Co. vs. Bell, 20 Sup. Ct. Rep. 399-402.

A suit brought in support of an adverse claim to a mine is not a suit involving the construction of the Constitution or any law of the United States.

Bushnell vs. Crooke Ming. & Smelting Co., 13 Sup. Ct. Rep. 771;

Shoshone Mining Co. vs. Rutter et al., 20 Sup. Ct. Rep. 726;

Blackburn vs. Portland Gold Mining Co., 20 Sup. Ct. Rep. 222.

It is thoroughly well settled by the foregoing authorities that it must appear from the plaintiff's own statement of his case that a federal question is involved. This must appear from a statement of the facts necessary to be set forth under the rules of good pleading in order to show a cause of action in favor of the plaintiff. It cannot be deduced from anything contained in the complaint, which

is not material to the plaintiff's cause of action. It is as thoroughly well settled that the plaintiff cannot anticipate the defense of the defendant, and by statements contained in his pleadings for that purpose present a federal question. In other words, he cannot create jurisdiction in the Circuit Court by anticipating the defendant's defense or alleging what the defendant claims, or will claim in the case. The decision of the United States Circuit Court of Appeals is to this effect; of itself it is entirely sufficient in its statement of argument, reason and authority to support the proposition. We refer the Court to it.

Montana Ore Purchasing Co. vs. Boston & Montana Con. Copper and Silver Mng. Co., 93 Fed. 274.

Since that decision was rendered this Court has had occasion to pass upon the question, and its opinion, which is in accord with the opinion of the Circuit Court of Appeals above mentioned, is determinative of this question.

Excelsior Wooden Pipe Co. vs. Pacific Bridge Co. 22 Sup. Ct. Rep. 681;

Florida Cent. & P. R. Co. vs. Bell, 20 Sup. Ct. Rep. 399.

See also:

Railroad Co. vs. Lewis, 172 U. S. 457; 19 Sup. Ct. Rep. 451;

Colorado Central Con. M. Co. vs. Turck, 150 U. S. 138;

Egan vs. Hart, 17 Sup. Ct. Rep. 300.

Now this Court cannot take jurisdiction of this case in face of that decision, but it would not claim jurisdiction for another reason. The United States Circuit Court of Appeals having determined the question, and no appeal having been taken from its decree, this Court will not, in the face of that adjudication and that fact, entertain jurisdiction of this appeal.

Robinson vs. Caldwell, 165 U. S. 359;

Carter vs. Roberts, 20 Sup. Ct. Rep. 713.

The appeal should have been taken from the judgment of the United States Circuit Court of Appeals.

Howard vs. United States for the use of Steward, 22 Sup. Ct. Rep. 543.

Again, where jurisdiction is shown by the complaint it may be taken away by the answer. It is made the duty of the United States courts to dismiss a case the moment it appears that the Court has no jurisdiction or that a federal question is not involved. The answer in this case shows clearly that there is no federal question involved. That where jurisdiction is shown by the complaint it may be taken away by the answer is a proposition thoroughly established by the decisions of this court, and these decisions also establish the

proposition that the defendant has a right to deny that he will claim or assert the things which the plaintiff charges he will claim, and the right to disclaim as to all such allegations contained in the complaint.

Robinson vs. Anderson, 121 U. S. 522;

Florida Cent. & P. R. Co. vs. Bell, 20 Sup. Ct. Rep. 399;

Excelsior Wooden Pipe Co. vs. Pacific Bridge Co., 22 Sup. Ct. Rep. 681;

M. O. P. Co. vs. B. & M. Co., 93 Fed. 274;

Railroad Co. vs. Lewis, 173 U. S. 457;

Colorado Central Con. M. Co. vs. Turck, 150 U. S. 138.

Where the complaint does not show that a federal question is involved and necessary for a decision of the case, it is equally well settled that a defense which may be interposed by pleading or evidence under a law of the United States will not confer jurisdiction.

Peabody Min. Co. vs. Mining Co. 111 Fed. 817-822, and cases cited;

Pratt et al. vs. Paris Gas Light & Coke Co., 18 Sup. Ct. Rep. 62, at 64;

And cases cited, supra.

What we have already said and the authorities which we have already cited are sufficient to dis-

pose of this case in favor of the motion to dismiss; but we beg to call the Court's attention to the further propositions:

1. That the complaint and the answer thereto raise only issues of fact and present no question of the construction of the Constitution or laws of the United States; and

2. That if it could be argued that any such question was involved, it has been decided by this Court, and after a decision of a question by this Court it is no longer a federal question.

On the first proposition it would seem to be sufficient to refer to the allegations of the complaint constituting plaintiff's cause of action, and to the answer thereto. Whether the plaintiff is the owner of the ground claimed by it and the defendant is the owner of the ground claimed by it, is a question of fact, whether defendant's possession was under a superior title or whether there is a vein which has its apex within the defendant's ground and which has and can be followed down into the plaintiffs' ground, also presents a question of fact, as does the location, character, extent and direction of the veins and ore bodies, and under the decision these questions of fact do not present any federal question.

Murray vs. Blue Bird Ming. Co. Ltd., 45 Fed. 385;

Blue Bird Mng. Co., Ltd., vs. Largey, 49 Fed. 289;

Foster vs. Kansas, 112 U. S. 201;

Dewey Ming. Co. vs. Miller, 96 Fed. 1;

California Oil & Gas. Co. vs. Miller, 96 Fed. 12, at p. 17;

Bushnell vs. Crooke M. & S. Co., 13 Sup. Ct. Rep. 771, and cases cited;

Water Co. vs. Keyes, 96 U. S. 199-203;

Wise vs. Nixon, 78 Fed. 203.

All questions which might possibly arise in the trial of the case have been determined by this Court and, therefore, even though any of such questions might arise, they would not present federal questions or give the Circuit Court jurisdiction. It is not apparent that there is, or was, any dispute between the parties as to the law, and therefore it is highly improbable that in the trial of the case any questions calling for the application of the laws of the United States would arise. We need not discuss this phase of the case, however, for the reason that no federal question is presented by the complaint. We are not to be understood as taking the position that the Court would have jurisdiction if a federal question was raised by the answer. The authorities above cited show that it would not have such jurisdiction, but assuming for the sake of the argument the possibility of a

claim of a federal question being presented, it could not give jurisdiction. Every question which could possibly arise under the issues made by the pleadings has been passed upon and determined by this Court in the following cases, and the cases therein cited:

Iron Silver Ming. Co. vs. Elgin, 118 U. S. 196;

Walrath vs. Champion Ming. Co., 18 Sup. Ct. Rep. 909;

Del Monte M. & M. Co. vs. Last Chance M. Co., 18 Sup. Ct. Rep. 895, and cases cited.

Clark vs. Fitzgerald, 18 Sup. Ct. Rep. 941.

In questions of trespass it seems to be quite well settled that one who enters beneath the surface of the mining claim of another is *prima facie* a trespasser and must justify his presence there. He, therefore, has the burden of proof and he must discharge it by presenting a state of facts which will entitle him to defeat the action. Now as the law has been declared by this Court with reference to mining claims and the rights of the parties whether or not he can justify will present only questions of fact.

Iron Silver Ming. Co. vs. Campbell, 17 Colo. 267;

Duggan vs. Davey, 4 Dak 110;

Leadville Ming. Co. vs. Fitzgerald, 4 Morris Ming. Reports, 380;

Doe vs. Waterloo, 54 Fed. 935.

All questions as to the construction of the law having been determined by this Court, no federal question exists.

Kansas vs. Bradley, 26 Fed. 289;

Blue Bird Ming. Co. vs. Largey, 49 Fed. 289;

Foster vs. Kansas, 112 U. S. 201.

The proper rule is that the case should be tried in the state court and that, if during the progress of the trial federal questions arise and are decided, an appeal should be prosecuted from the state court to the Supreme Court of the United States; it must be presumed in the first instance that the state court will properly declare the law of the United States and apply it.

New Orleans vs. Benjamin, 153 U. S. 411; 14 Sup. Ct. Rep. 905.

Upon the foregoing considerations and authorities the appeal should be dismissed with costs, and we pray the judgment of this Court that the same be done.

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IV.

ON THE MOTION TO AFFIRM AND ON THE MERITS.

ARGUMENT AND AUTHORITIES.

Little more attention need be given to the argument and authorities of the appellant than to restate the proposition that appellant's brief and argument is not founded upon or supported by the facts in the case, and that it proceeds upon assumptions which have no support in the record, and that the authorities cited have no application to the matters sought to be presented by this appeal. They certainly lend no support to the claim of appellant that the amended bill of complaint conferred jurisdiction upon the Circuit Court, and that, if it did disclose any jurisdiction, the defendants had no right to disclaim, or that that jurisdiction, so shown upon the face of the complaint, could not be defeated or taken away by the answer.

We need not cite to the Court the authorities in support of the proposition that the jurisdiction of the United States Court is limited, and that the more recent statutes passed with reference to its jurisdiction had the purpose of circumscribing and

limiting it; a reading of the decisions of this Court to which we have already referred in support of the motion to dismiss will disclose a construction of these statutes as bearing upon this subject.

The argument and authorities which we have already presented in support of the motion to dismiss are hereby respectfully referred to in support of the motion to affirm, in the event the Court shall come to a consideration of that motion, or a determination of the merits of this appeal. *They will be found amply sufficient to justify the affirmance which we pray.*

We may be permitted, however, to refer briefly to some of the matters stated by appellant in argument, but if we were to refer to them in particular, it would be only a repetition of what we have already set forth. The Court will perceive that every allegation contained in the amended complaint, and upon which the appellant relies to show a federal question, has been disclaimed by the appellees. It seems to be conceded that the decision of the United States Circuit Court of Appeals made upon the original complaint and reported in the 85th Federal Reporter, at page 867, was and is correct. The contention is made that the allegations which were added to the amended bill brought it within the suggestion made by the Circuit Court of Appeals in that case that there might be a federal question involved if properly

pleaded. *That they did not do so, however, is attested by the decision of the same court, reported in the 93rd Federal Reporter, at page 274.* Of course, appellant's counsel say nothing in their brief about this decision. They seem to evince an ill-natured disposition about the case, and offer some criticism of the answer of the appellees. Their idea expressed in the brief seems to be that because appellant brought this action in the United States Circuit Court,and because of that fact alone, that Court had jurisdiction, and that the appellees are very greatly to be blamed for having questioned its jurisdiction and thereby preventing the appellant from having the case tried there. The character of the remarks indulged in by counsel for appellant neither call for nor would justify us in attempting to make a reply in kind. This much only we will say on the subject: That if the Circuit Court did not have jurisdiction, it certainly could not claim any authority over the parties, to supervise or control their actions or conduct with reference to the subject-matter of the action in a case which might be brought in the state court. With such a case it would not and could not have any proper concern, and it would be a reflection upon its dignity and integrity to assume that it would feel or manifest any interest therein, either with reference to the character of the complaint which might be filed, or to the defenses which might be interposed thereto, or to

the result or determination which might follow.

On page 12 of the brief counsel refer to a case decided by the Supreme Court of the State of Montana, and follows the reference by claims as to what the Court said in such case, and as to the argument of counsel, as though they were appealing from that decision to this Court. We must express our inability to perceive any relevancy of this matter, or any justification for its attempted intrusion into this case. That it is not in the record ought to have been a sufficient reason to persuade counsel from making the references.

On page 13, paragraph "d," another reference is made to a case said to be pending. We must disclaim knowledge of this case or of any justification for its insertion in the brief.

Paragraph "e," on said page, is also a misstatement, as is likewise paragraph "f."

The claims which counsel assert are made, following these references, are best disposed of by a reference to the answer in the case, which shows that counsel are altogether mistaken. The Rarus claim, or the Rarus patent, is in nowise involved in this case, but if it were, it would not present a federal question. This Court would not occupy its time with considering a question which it had already determined, and if it did, it would not do so further than to affirm a judgment or decision which was made in compliance with it.

The fact that the decision of the Circuit Court

or of the United States Circuit Court of Appeals was made before or after the decision by this Court could make no difference. The decision in the case of *Del Monte Mining & Milling Co. vs. Last Chance Mining Co., 171 U. S. 55,* was rendered on May 23rd, 1898; the decision of the United States Circuit Court of Appeals was made in this case on February 13th, 1899.

The appellees did not claim to own any portion of the ground by virtue of the Rarus patent, or any other rights than those conferred by the patent from the United States for that portion of the Johnstown lode claim claimed by them. There was no question of the construction of these patents involved; the answer shows that the reliance of the defendants was upon the rights acquired from the Johnstown patent, and confined to the rights of the Johnstown claim as patented, and to such rights as proceeded therefrom to the parcel of ground claimed by them. Neither was there any question involving the right of a vein having a divided apex. The defendants claimed the entire apex in their portion of the ground, and set forth a disclaimer of the claim which the plaintiff asserted they would make with reference to a vein crossing the side line, or being divided by the side line. So that, taking the complaint in the first instance, in its statement of a cause of action, it presented no federal question, and it comes squarely within the authorities which hold that unless the

complaint, in its statement of a cause of action, presents a federal question, the Court has no jurisdiction.

The only grievance complained of is that the defendants entered within the portion of the ground claimed by the plaintiff and mined, took away and converted to their own use ores and minerals therefrom. Appellants say, on page 21 of the brief, that it is, in effect, an action to *quiet its title.* Taking this statement as correct, then the complainant did not give the Court jurisdiction, for the reason that the complainant did not allege possession, and did not present any question for the construction of a law of the United States. We need only refer on this point to the authorities which we have already cited, and repeat again that this statement of the complaint could only present questions of fact.

None of the authorities referred to in the first division of appellant's argument need be noticed, except the cases of *Walla Walla vs. Walla Walla Water Co., 172 U. S. 1,* and *Cox vs. Gilmer, 88 Fed. 343* A reference to these cases will show that it was necessary, in the statement of plaintiff's cause of action, to disclose the existence of a federal question, and that it was so disclosed. Without the statement from which the federal question arose, the plaintiff's complaint in these actions would have been a mere blank and would not have

stated any cause of action whatever. No argument is necessary to point this out, as it appears from the plain statements of the Court in the opinions themselves. They have, however, not the slightest application to the case here presented. A comparison of them with the facts in this case and with the decisions which we have cited in support of the motion to dismiss will at once dispose of any question of their applicability here and must inevitably lead to the conclusion that the Circuit Court did not have jurisdiction.

A motion to affirm will be sustained if the dismissal of the bill for want of jurisdiction was correct.

Bienville Water Supply Co. vs. Mobile, 20 Sup. Ct. Rep. 40.

V.

The second division of appellant's brief in the discussion of the contention, that a federal question being presented by the complaint cannot be eliminated by the defendants' answer, has been disposed of by the authorities which we have heretofore cited. Of course, no federal question was presented by the bill of complaint in this case, but had there been such a question presented the answer of the defendants would have divested the case of any such question. The appellant has been

quite unhappy in the selection of cases, and in the argument presented in this part of the brief. A glance at the cases cited will show their entire inapplicability. In answer to this portion of appellant's brief we may safely rely upon the following authorities, which have already been cited:

California Oil & Gas Co. vs. Miller, 96 Fed. 12;

Lampasas vs. Bell, 21 Sup. Ct. Rep. 368;

Florida Cent. & P. R. Co. vs. Bell, 20 Sup. Ct. Rep. 399;

Wise vs. Nixon, 78 Fed. 203;

M. O. P. Co. vs. B. & M. Co., 93 Fed. 274;

Bushnell vs. Crooke Ming. & Smelting Co., 13 Sup. Ct. Rep. 771;

Shoshone Ming. Co. vs. Rutter et al., 20 Sup. Ct. Rep. 726;

Blackburn vs. Portland Gold Ming. Co., 20 Sup. Ct. Rep. 222;

Excelsior Wooden Pipe Co. vs. Pacific Bridge Co., 22 Sup. Ct. Rep. 681;

R. R. Co. vs. Lewis, 172 U. S. 457; 19 Sup. Ct. Rep. 451;

Colorado Cent. Con. Ming. Co. vs. Turck, 150 U. S. 138;

Egan vs. Hart, 17 Sup. Ct. Rep. 300;

Robinson vs. Anderson, 121 U. S. 522;

Peabody Ming. Co. vs. Mining Co., 111 Fed. 817; 822 and cases cited;

Pratt et al. vs. Paris Gaslight & Coke Co., 18 Sup. Ct. Rep. 62, at p. 905.

In *Excelsior Wooden Pipe Co. vs. Pacific Bridge Co., supra,* this Court sayeth:

"While it seems reasonable to say that a jurisdiction once acquired by the filing of a proper bill ought not to be taken away by any subsequent pleading, the statute is peremptory in this particular and requires the Court to dismiss the case whenever *at any time* it shall appear that its jurisdiction has been improperly invoked. We are by no means without authority upon this question."

Then the Court cites and approves:

Robinson vs. Anderson, 121 U. S. 522.

No argument upon the authorities which we have cited is necessary, as they are conclusive upon all propositions advanced by the appellant against the contention made by it. The appellant presented the same argument as contained in its brief to the Circuit Court of Appeals, and it received the answer of that Court contained in its decision reported in *93 Fed. 274.*

We are entirely satisfied with that answer and submit to this Court that it is absolutely correct.

We, therefore, respectfully submit that if this

Court shall come to a consideration of the merits of this appeal it should enter its order or decree herein affirming the decree dismissing the action.

JOHN J. McHATTON,
JOHN W. COTTER,
Attorneys for Appellees.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1904

No. 204

THE BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING COMPANY, APPELLANT,

vs.

THE CHILE GOLD MINING COMPANY, JOHN H. CHEEVER, EDWARD L. WILLMORE, CARLOS WARNER, AND STEPHEN S. RAYMOND.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

FILED MAY 31, 1904.

(16,176.)

(18,176.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No 330.

THE BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING COMPANY, APPELLANT,

vs.

THE CHILE GOLD MINING COMPANY, JOHN MacGINNISS, EDWARD L. WHITMORE, CARLOS WARFIELD, AND STEPHEN S. RAYMOND.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

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1 Pleas before the Honorable Hiram Knowles, judge of the district court of the United States for the district of Montana, sitting in the circuit court of the United States, ninth circuit, district of Montana, at the February term, 1901, thereof.

Be it remembered that on the 15th day of April, 1898, the complainant filed its bill of complaint herein which is in the words and figures as follows, to wit:

2 In the Circuit Court of the United States, Ninth Circuit, for the District of Montana, Southern Division.

BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING Company (a Corporation), Complainant,
vs.
CHILE GOLD MINING COMPANY (a Corporation), JOHN MACGINNISS, Edward L. Whitmore, Carlos Warfield, and Stephen S. Raymond, Defendants.

Be it remembered that the complainant herein filed its bill of complaint on the 15th day of April, 1898, which is in words and figures as follows, to wit:

3 In the Circuit Court of the United States, Ninth Circuit, for the District of Montana, Southern Division. In Equity.

BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING Company (a Corporation), Complainant,
vs.
CHILE GOLD MINING COMPANY (a Corporation), JOHN MACGINNISS, Edward L. Whitmore, Carlos Warfield, and Stephen S. Raymond, Defendants.

Bill of Complaint.

To the honorable judges of the circuit court of the United States, ninth circuit, district of Montana:

The Boston and Montana Consolidated Copper and Silver Mining Company, a corporation, organized and existing under the laws of the State of Montana, and a citizen of the State of Montana, files this its bill of complaint against the Chile Gold Mining Company, a corporation organized under the laws of the State of Montana and a citizen of the State of Montana, John MacGinness, Edward L. Whitmore, Carlos Warfield, and Stephen S. Raymond, all of Butte city, county of Silver Bow, State of Montana, and all citizens of the State of Montana; and thereupon your orator complains and says:

4 That your orator is now, and at all the times hereinafter mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Montana, with its principal

place of business at Butte city, Silver Bow county, State of Montana.

That the defendant, The Chile Gold Mining Company, is now and at all the times hereinafter mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of Montana, with its principal place of business at Butte city, Silver Bow county, State of Montana.

That your orator is the owner and entitled to the possession of that portion of the following-described property known as and called the "Pennsylvania" Lode mining claim, lot number 172, situated in Summit Valley mining district, Silver Bow county, Montana, which is particularly bounded and described as follows, to wit:

Beginning at corner number one, from which the quarter section corner on the north boundary of section eighteen in township three, north range seven, west of the principal meridian for Montana bears north three degrees fifty-seven minutes, west seven hundred and thirteen feet distant, and corner number three of lot number sixty-four, the St. Lawrence claim, and corner number two of lot number one hundred twenty-six, the Little Ida claim, bears north eighty-three degrees, ten minutes east, four hundred and forty-nine feet distant Thence first course, magnetic variation, nineteen degrees forty-five minutes east, south eighty-eight degrees fifteen minutes, east fifty-six feet to a point on east end line of lot one hundred forty-seven, the Rob Roy Lode claim; for point of intersection of said lots 147 and 172, from which corner number five of said lot 147 bears south eleven degrees east two hundred and ninety-six feet distant; one thousand five hundred feet to corner number two. Thence second course magnetic variation twenty degrees east, south 4 degrees 30 minutes west 564.6 feet to a point on the north boundary line of mineral application 722, a placer claim from which the northwest corner of said mineral application 722, which is also the northeast corner of mineral application 686, a placer claim, bears west 183.9 feet, distant, six hundred feet to corner number three. Thence, third course, magnetic variation 20 degrees east, north 88 degrees 15 minutes west 181.3 feet to a point on the west boundary line of said mineral application 722, and east boundary line of said mineral application 686, from which the northwest corner of said mineral application 722 and the northeast corner of said mineral application 686 bears north 29.8 feet, distant, nine hundred and twenty-four feet to a point over a tunnel, from which the mouth of said tunnel bears south 58 feet, distant, eleven hundred and fifty-six and two-tenths feet to a point on the north boundary line of said mineral application 686, from which the northeast corner of said mineral application 686 bears east 974.4 feet distant, fifteen hundred feet to corner number four, from which the southwest location corner bears south four degrees 30 minutes west 48 feet distant; discovery shaft bears north 70 degrees 30 minutes east 827 feet distant; corner number five of lot 147 bears north 27 degrees 30 minutes east 344 feet distant, and corner number three of lot 146, the Grant Extension lode, bears south 36 degrees 45 min-

utes west 152 feet distant. Thence fourth course, magnetic variation 20 degrees east north four degrees 30 minutes east 325 feet to a point on south side line of said lot 147, for point of intersection of
6 said lots 147 and 172 from which corner number five of said lot 147 bears south 82 degrees 4 minutes east 135 feet distant; six hundred feet to corner number one, the place of beginning. Expressly excepting and including herefrom all that portion of the ground heretofore described, embraced in said mining claim or lot number 147; also mineral applications 686 and 722; and also that portion of the said Pennsylvania vein or lode, and also all veins, lodes or ledges throughout their entire depth, the tops or apices of which lie inside of such excluded ground. Also excepting and excluding therefrom all that portion of the said above-described Pennsylvania Lode claim described as follows, to wit: Beginning at the northeast corner of lot number 172, and running thence north 88 degrees 15 minutes west 130 feet; thence south 69 degrees 25 minutes east 136 feet; thence north 4 degrees 30 minutes east 44 feet, to the place of beginning, and containing an area of $\frac{7}{100}$ of an acre of ground.

That this complainant became and was and is the owner of the said premises in the following manner, to wit:

That on the 18th day of June, 1877, William Harris, Sr., and William Harris, Jr., duly located the said Pennsylvania Lode claim as a quartz lode mining claim.

That on the 13th day of January, 1879, the said William Harris, Sr., and William Harris, Jr., duly conveyed to John E. Lloyd, David L. Lloyd, and Thomas E. Lloyd, by regular deed of conveyance a one-half undivided interest in and to the said Pennsylvania Lode claim.

That on January 13th, 1879, he, said William Harris, Sr., and William Harris, Jr., duly conveyed to John H. Davis by
7 regular deed of conveyance an undivided one-sixth interest in and to the said Pennsylvania Lode claim.

That on the 19th day of May, 1879, the said John H. Davis duly conveyed to William Harris, Sr., by regular deed of conveyance an undivided one-twelfth interest in and to the said Pennsylvania Lode claim.

That on the 19th day of May, 1879, the said John H. Davis duly conveyed to John Dunstan, by regular deed of conveyance a one-twelfth undivided interest in and to the said Pennsylvania Lode claim.

That on March 13th, 1880, David J. Lloyd conveyed to William W. Thomas by regular deed of conveyance an undivided one-twelfth interest in and to the said Pennsylvania Lode claim.

That on the 14th day of August, 1880, William Harris, Sr., and William Harris, Jr., conveyed to Thomas Griffith by regular deed of conveyance an undivided one-twelfth interest in and to the said Pennsylvania Lode claim.

That on July 16, 1882, Thomas C. Porter and Howell M. Thomas, the duly appointed, qualified and acting administrators of the estate of William H. Thomas, deceased, duly authorized and empowered,

conveyed by regular deed of conveyance to John E. Lloyd an undivided one-twelfth interest in and to the said Pennsylvania Lode claim.

That on the 19tl. day of July, 1882, the said John E. Lloyd by regular deed of conveyance conveyed to Jeremiah Griffith an undivided one-twelfth interest in and to the said Pennsylvania Lode claim.

That on the 15th day of August, 1883, the said William E. Harris, Jr., and Annie Harris, his wife, by regular deed of conveyance,
8 conveyed to Thomas Griffith an undivided one-eighth interest in and to the said Pennsylvania Lode claim.

That on the 19th day of April, 1886, a United States patent for the said Pennsylvania Lode claim was duly issued by the United States to William Harris, Sr., William Harris, Jr., John E. Lloyd, David J. Lloyd, Thomas E. Lloyd, Jeremiah Griffith and John Dunstan.

That on the 26th day of March, 1888, the said Jeremiah Griffith by regular deed of conveyance conveyed to Enoch Grim an undivided one-twelfth interest in and to the said Pennsylvania Lode claim.

That on the 31st day of March, 1888, the said John E. Lloyd, Margaret Lloyd, his wife, Jeremiah Griffith, Enoch Grim, John H. Davis and Laura Davis, his wife, William Harris, Jr., and Anna Harris his wife, Thomas Griffith and David J. Lloyd by John E. Lloyd, his attorney-in-fact, by regular deed of conveyance, conveyed to Thomas Couch all that portion of the said Pennsylvania Lode claim hereinbefore described as the property of the complainant, excepting a right of way to the Montana railway.

That on the 30th day of November, 1888, by regular deed of conveyance the said Thomas Couch and Rachel Couch, his wife, conveyed to this complainant, The Boston & Montana Consolidated Copper and Silver Mining Company, all that portion of the said Pennsylvania Lode claim hereinbefore described as the property of this complainant and that thereby and by virtue of the said conveyances the complainant became and was and is the owner of the said premises hereinbefore described.

That on or about the 28th day of March, 1898, the said de-
9 fendant wrongfully and unlawfully entered into the said premises hereinbefore described, and by underground workings and by tunnels, shafts, cross-cuts and levels, and extracted from the said premises large quantities of valuable ores, to wit: ten thousand (10,000) tons, more or less, and of the reasonable value of seventy-five thousand (75,000) dollars.

And that ever since the said date the said defendants have continued to extract and mine ores from the said premises belonging to this complainant, and are now mining and extracting ores therefrom and threaten to continue to do so unless this court shall by its injunction restrain and enjoin the said defendants from so doing.

That the said ground of this complainant is valuable almost exclusively for the minerals therein contained, and that the same is

very valuable for the copper and silver and gold ores which are found therein in large quantities, and that it is these ores that the defendants have extracted, and which they are now extracting and mining and threatening to continue to extract in the future.

That the said ground owned by the complainant, hereinbefore described is of the reasonable value of more than one hundred thousand dollars, and that the said ores which the defendants are extracting and threatening to extract are of the value in excess of fifty thousand dollars.

The complainant further alleges that it has no means of ascertaining the quantity or value of the ores which the said defendants are extracting or may extract from the said premises owned by the complainant, and that if the said defendants are permitted and
10 allowed to continue to extract the said ores from the said premises that it would be altogether uncertain and indefinite as to what amount of ores or the value thereof which may be extracted in the future as in the past, and that the complainant will be compelled to rely to a great extent upon the good faith and showing of the defendants as to the amount and value of the ores which they have heretofore and may hereafter extract from the said premises.

That unless the defendants are enjoined and restrained from mining and extracting the ores from the said premises of this complainant the said portion of the said Pennsylvania Lode claim, this complainant will be required to bring numerous actions for the determination of the damages which it has sustained and will sustain by reason of such trespasses, and that the said trespasses on the part of the said defendant are continuing from time to time, and that this complainant brings this action in order to avoid a multiplicity of actions in the premises.

That by reason of the said trespasses on the part of the said defendant on the premises of this complainant, this complainant has suffered and will continue to suffer great and irreparable injury and damages.

That on or about the 15th day of April, 1898, this complainant brought an action in the circuit court of the United States, the ninth circuit, for the district of Montana, southern division, against the said defendants to recover of the said defendants for the ores extracted from the said portion of the Pennsylvania claim, hereinbefore described, and that the said action is now pending in this court.

And, as showing the jurisdiction of this court to determine the said matters set forth in the said action, this complainant alleges:

11 That the determination of the said controversy between the said complainant and the said defendants, involves the construction of title twenty-three, chapter VI of the Revised Statutes of the United States, concerning mines and mineral lands, in this, to wit:

That the said Pennsylvania Lode claim owned and claimed by this complainant, as hereinbefore alleged, is a mining claim duly

located under the provisions of the statutes of the United States relative to the appropriation of mineral lands and that the same has been patented as a mining claim under the provisions of the said statutes.

That the said defendants are, or claim to be the lessees of or to have some interest in a portion of that certain quartz lode mining claim known as and called the Johnstown Lode claim, lot number 173, and also a portion of the Little Ida Lode claim, lot number 126, which said claims lie north of and partly adjoining and near to the said Pennsylvania Lode claim on the north; that plaintiff is not acquainted with the exact metes and bounds of said ground claimed by the defendants.

That the said Rarus Lode claim, Johnstown Lode claim, and Little Ida Lode claim, are mineral claims located under the laws of the United States relative to the appropriation and location of mineral lands, and complainant is informed and believes and therefore alleges that the said claims or some of them have been patented by the United States to various parties, and that such patents were issued under and by virtue of the statutes of the United States relative to the patenting of mineral lands upon the public domain.

12 That as complainant is informed and believes, and therefore alleges, the said defendants claimed the right to enter upon the premises of this complainant, to wit, that portion of the Pennsylvania Lode claim above described, by reason of the fact that certain veins, leased or claimed by the defendants or in their possession have their tops or apices within the ground owned or claimed as a part of the Rarus Lode claim, or a portion of the Johnstown Lode claim, or a portion of the Little Ida Lode claim, and that defendants assert the right to follow such veins on their downward course or dips although the same so far depart from a perpendicular as to depart from the ground leased or claimed by the defendants and enter the premises owned or claimed by this complainant, to wit, that portion of the Pennsylvania Lode claim hereinbefore described.

But complainant denies and disputes the fact that the said veins upon which the said defendants have mined within the lines of the Pennsylvania Lode claim, even if such veins have their apices in the said Rarus Lode claim, or said Johnstown Lode claim, or said Little Ida Lode claim, which complainant does not admit, are such veins as can be followed on their dip beyond the lines of said lode claims and into the ground or premises of this complainant; but alleges the facts to be, that the said veins are broken and intersected by faults in such a manner that the same cannot be traced or followed from the said Rarus or Johnstown, or Little Ida Lode claims into the Pennsylvania Lode claim and that therefore the said defendants have no right to enter upon the ground of this complainant, to wit: the said Pennsylvania Lode claim, for

13 the purpose of extracting ores therefrom by reason of their claim upon or interest in the apices of any veins within the Rarus or Johnstown or Little Ida Lode claims.

And this complainant further shows that the veins upon which the defendants have been extracting ore within the premises of this complainant, if they or any of them have their apices on the said Rarus or Johnstown or Little Ida claims, which complainant does not admit, do not in their course or strike depart from the end lines of the defendants' claims or possessions, but that the said depart from the side lines of such claims in such a manner as to prohibit the said defendants from following the same beyond the said lines of said lode claim into complainant's portion of the said Pennsylvania claim.

That there are several veins which the defendants claim the right to follow on their dip beyond the side lines into the ground of this complainant, the said Pennsylvania Lode claim, but that neither of the said veins in their course or strike depart from the end lines of the said Rarus or Johnstown or Little Ida Lode claims, if they have their apice- within said lode claims at all; but complainant alleges that the ground in which the defendants claim some interest as aforesaid, was not so located or situated as to have any end lines whatever as provided by the statutes of the United States in such cases and in consequence of such failure upon the part of the locator or locators of the ground or claims leased or owned by the defendants, to mark the same with end lines parallel or to locate the same along the veins, but on the contrary having located the same across the veins, the defendants and their lessors or grantors have no extralateral rights in or to any of the veins in their said ground, and are not
14 entitled to follow the same into or upon the ground of this complainant and the said portion of the said Pennsylvania Lode claim.

And complainant further shows that a patent was issued by the United States of America to Stainislas E. Hirbour and others to that certain quartz lode claim known as and called the Rarus claim hereinbefore referred to, a copy of which patent is hereto attached, marked "Exhibit A" and made a part of this complaint.

And complainant further shows that a patent has been granted by the United States of America to William Harris, Sr., and others to that certain quartz lode claim, known as and called the Johnstown lode claim, a copy of which patent is hereto attached, marked "Exhibit B" and made a part of this bill.

And as showing that the questions involved in this controversy are questions arising under the statutes of the United States and involving the construction thereof, complainant shows and alleges that the said defendants herein claimed to be the lessees or to have some interest in a portion of the ground patented under the said Johnstown and Rarus patents and that by virtue of the said Rarus patent and that they, the said lessors and grantors, have acquired thirteen hundred and eighteen linear feet of what is designated and called the Rarus lode, and it is contended by the said defendants that under and by virtue of the said Rarus patent that they and their said lessors and predecessors in interest were granted thirteen hundred and eighteen linear feet to the Rarus lode, extending from

what is known as the east end line of the Rarus claim to an imaginary or projected line of the Rarus location.

And complainant further shows that the surface ground
15 patented to the lessors or predecessors in interest of defendants to the Rarus Lode claim does not include to exceed three hundred linear feet of the said Rarus lode as shown in yellow shadings on map attached to Rarus patent, but that notwithstanding the fact that the surface ground granted by the said Rarus patent did not cover or extend over the said Rarus lode the defendants contend and claim that the said patent of the Rarus claim, granted to them and their lessors and predecessors in interest, the said Rarus Lode claim beyond the surface ground granted by the Rarus patent and to the full extent thereof of 1,318 linear feet; and also contend and claim that by reason of the ownership of the said lode for the length aforesaid, and that by reason of the fact that the same passes through the east end line of the Rarus claim as patented and the west end line of the original location of the said claim, that they are entitled to follow said veins on their courses or dips into the earth and without the lines of the Rarus claim both as originally located and as patented.

Your complainant further shows that a large quantity of the ground which it is claimed by the defendants was originally included within the location of the Rarus claim has been patented under the said Johnstown patent, hereinbefore referred to and as shown by the portion shaded in yellow in the plat attached to the Johnstown patent. That notwithstanding that a portion of the Rarus location was patented under the Johnstown claim, the defendants contend and claim that only the surface ground of the Johnstown claim was patented to the patentees therein named and that all veins lying within the original location lines of the Rarus claim were patented to the claimants under the Rarus claim,
16 and that defendants or their lessors or grantors are entitled to claim the said veins extending through the Johnstown patent under and by virtue of the Rarus patent, and that its extralateral rights should be determined by the Rarus and not by the Johnstown patent.

Complainant further shows that it disputes each and every one of the claims made by the defendants relative to the construction of the said several patents and claims that all veins whose apices lie within the Johnstown patent must be governed and regulated in extralateral rights, if any they have under the Johnstown patent and not under and by virtue of the Rarus patent.

And complainant further shows that the defendants claim that if they have no right to follow the veins within the lines of the original Rarus location, by virtue of the said Rarus patent, that they have a right to follow the same under and by virtue of the Johnstown patent, or the Johnstown and Rarus patents combined, under and beneath that portion of the Pennsylvania Lode claim belonging to this complainant, but opposed to this contention the complainant contends and insists that the defendants have no right to follow any vein having its apex within either the Johnstown or

Rarus patents under any circumstances into or under the Pennsylvania Lode claim at any point of the east of the intersection of the south side line of the Johnstown patent within the south side line of the original Rarus location.

And complainant further shows that the said defendants contend that the complainant cannot under any circumstances obtain any relief for ores extracted within that portion of the premises owned by it without first showing that the apices of the veins from
17 which the ores were extracted are within the surface lines of the ground owned and claimed by the complainant, whereas complainant contends that *prima facie* it is the owner of all ores found within its boundaries extended downward into the earth until it has been shown that some other persons or company has some right thereto by reason of the ownership of the apex of the vein within some other claim.

The complainant further shows that it is claimed by the defendants that the apex of the veins from which the ores in question were extracted is divided in that portion thereof, is claimed by the defendants as part of the Rarus Lode claim, and a portion thereof upon the Johnstown Lode claim and a portion thereof upon the Pennsylvania Lode claim.

And defendants claim that by reason of said divided apex, that they may claim the right to follow the said vein beneath the surface and without the side lines of the Rarus and the Johnstown Lode claims under and by virtue of either or both of the said claims at their election.

Complainant alleges that if any such vein exists as is claimed by the defendants that they have no extralateral rights by reason of the fact that the same has a divided apex.

Wherefore, your complainant prays that the said defendants, Chile Gold Mining Company, John MacGinniss, Edward L. Whitmore, Carlos Warfield and Stephen S. Raymond, their servants, agents, attorneys clerks, workmen and employees, be by this court forever enjoined and restrained from mining or extracting any ores from within the limits of that portion of the said Pennsylvania Lode claim, hereinbefore described, and from removing there-
18 from any ores which have heretofore been extracted therefrom or which may hereafter be extracted therefrom, and that until the hearing of the application of this complainant for an injunction, and pending the determination of the title to the said premises that the said defendants, their agents, servants, attorneys, clerks, workmen and employees be restrained and enjoined from mining or extracting ores from within the said portion of the said Pennsylvania Lode claim hereinbefore described and from removing any ores which they may have extracted therefrom, or may hereafter extract therefrom.

Your complainant further prays this honorable court to grant unto your complainant, not only a writ of injunction conformable to the prayer of this bill, but also a writ of subpœna of the United States of America, issuing out of and under the seal of this court to be directed to the said Chile Mining Company, John MacGinnis,

Edward L. Whitmore, Carlos Warfield, and Stephen S. Raymond, defendants, commanding them by a day certain to appear before your honors in the court aforesaid and answer unto this bill of complaint and abide the order and decree of this court and for such other and further relief as may be meet and equitable in the premises.

W. H. DE WITT,
JOHN F. FORBIS, AND
L. O. EVANS,
Of Butte, Montana, Solicitors and Counsel for Complainants.
BOSTON & MONTANA CONSOLIDATED COPPER AND SILVER MINING COMPANY,
By L. O. EVANS.

19 UNITED STATES OF AMERICA, } ss :
District of Montana, }

On this 15th day of April, 1898, before me, personally appeared L. O. Evans, who being first duly sworn, made solemn oath that he is one of the attorneys and solicitors for the complainant in the above-entitled bill, and that all the officers of the said complainant are absent from the district and State of Montana; that he has read the foregoing bill of complaint and knows the contents thereof and that the same is true.

L. O. EVANS.

Subscribed and sworn to before me this 15th day of April, 1898.
F. W. BACORN,
Notary Public for Silver Bow County, Montana.

COMPLAINANT'S EXHIBIT "A."

THE UNITED STATES OF AMERICA.

General Land Office No., 9457; mineral certificate No. 993.

To all to whom these presents shall come, Greeting:

Whereas, in pursuance of the provisions of the Revised Statutes of the United States, chapter six, title thirty-two, there have been deposited in the General Land Office of the United States the plat and field-notes of survey of the claim of Stanislas E. Hirbour, Joseph Ortyer, Eugene Fournier, Peter Tetrault, and the heirs of Michael Roy, deceased, upon the Rarus lode, accompanied by the certificate of the register of the land office at Helena, in the
20 Territory of Montana, whereby it appears that, in pursuance of the said Revised Statutes of the United States, the said Stanislas E. Hirbour, Joseph Ortyer, Eugene Fournier, Peter Tetrault, and the heirs of Michael Roy, deceased, did on the twelfth day of May, A. D. 1883, enter and pay for said mining claim or premises, being mineral entry No. 993, in the series of said office, designated by the surveyor general as lot No. 179, embracing a por

tion of section eighteen (18) in township three (3) north of range seven (7) west of the principal meridian, in the Summit Valley mining district, in the county of Silver Bow and Territory of Montana, in the district of lands subject to sale at Helena, containing two and ninety-eight hundredths ($\frac{98}{100}$) acres of land, more or less and according to the returns on file in the General Land Office, bounded, described and platted as follows, with magnetic variations at twenty (20) degrees east, to wit: Beginning at corner number one, a granite stone 16 x 13 x 8 inches in size, marked "L. M. C. 179," from which corner number one of lot No. 113, patented to W. J. McNamara *et al.*, with their claim upon the Mountain View lode, bears south fifty-seven (57) degrees, fifty-seven (57) minutes west at the distance of one hundred and seventy (170) feet, and the quarter-section corner on north boundary of section eighteen (18) in township three (3) north of range seven (7) west, of the principal meridian, bears north eighty-five (85) degrees, eighteen (18) minutes and forty (40) seconds west at the distance of seven hundred and eighty-four and one-tenth ($784\frac{1}{10}$th) ft.; thence from said corner number one south twenty-five (25) degrees forty (40) minutes west, thirty-five (35) feet to a granite stone 18 x 18 x 6 inches in size marked "P. L. M. C. 126–179," situate on north-
21 erly boundary of lot No. 126, made for the Little Ida lode, seventy-two and five-tenths ($72\frac{5}{10}$ths) feet to a granite stone 18 x 16 x 4 inches in size, marked "P. I. M. C. 173–179," situate on northerly boundary of lot No. 173, made for the claim of William Harris, Sr., *et al.*, upon the Johnstown lode, four hundred and twenty-two (422) feet to corner number 2, a granite stone 24 x 8 x 6 inches in size with mound of stones marked "2 M. C. 179," from which corner number one of said lot No. 126, the same being corner No. 2 of lot No. 64, patented to C. X. Larabie with his claim upon the St. Lawrence lode, bears north thirty-five (35) degrees, thirty-four (34) minutes west at the distance of two hundred and ninety (290) feet, and corner number one of said lot No. 173, bears north thirty-one (31) degrees, twenty-four (24) minutes west at the distance of three hundred and thirty-nine (339) feet; thence from said minutes east, two hundred and seventy-seven (277) feet to corner No. 2, south sixty-nine (69) degrees twenty-five (25) — a granite stone 18 x 18 x 6 inches in size, marked "P. I. M. C. 126–179," situate on southerly boundary of said lot No. 126, from which corner number three of said lot No. 126, bears north seventy-two (72) degrees, fifty-two (52) minutes east at the distance of four hundred and eighty-two (482), seven hundred (700) feet, to a granite stone 22 x 8 x 6 inches in size, marked "P. I. M. C. 173–179," situate on southerly boundary of said lot No. 173, from which corner No. 3 of said lot No. 173, bears north eighty-five (85) — thirty (30) minutes east at the distance of five hundred and sixty-seven (567) feet, eight hundred and seventy-one (871) feet to a granite stone 18 x 7 x 4 inches in size marked "P. I. M. C. 172–179," situate on northerly boundary of lot No. 172 made for the claim of William Harris, Sr., *et al.*, upon the
22 Pennsylvania lode, from which corner number two of said lot No. 172 bears south eighty-eight (88) degrees fifteen (15) minutes east at the distance of one hundred and thirty (130) feet; number

three shaft bears north fifteen (15) degrees west at the distance of one hundred and ninety-one (191) feet, and number two shaft bears north twenty-two (22) degrees east at the distance of one hundred and thirty-two (132), ten hundred and seven (1007) feet to a granite stone 20 x 12 x 4 inches in size, marked "P. I. M. C. 172–179," situate on easterly boundary of said lot No. 172, from which corner No. 2 of said lot No. 172, bears north four (4) degrees thirty (30) minutes east at the distance of forty-four (44) feet, and discovery shaft bears north ten (10) degrees east at the distance of one hundred and forty-three (143) feet, thirteen hundred and sixteen (1316) feet to corner number three, a granite stone 22 x 10 x 6 inches in size, marked "3 M. C. 179," from which corner No. 2, of said lot No. 172, bears north sixty-one (61) degrees twenty (20) minutes west at the distance of three hundred and twenty-one (321) feet; thence from said corner No. 3 north twenty-five (25) degrees forty (40) minutes east, one hundred and twelve (112) feet to a point from which the face of a tunnel bears north sixty-five (65) degrees west at the distance of eighty-seven (87) feet, four hundred and forty (440) feet to corner number four, a granite stone 18 x 8 x 6 inches in size, marked "4 M. C. 179"; thence north seventy (70) degrees nine (9) minutes two hundred and forty-six (246) feet to a granite stone 20 x 8 x 5 inches in size, marked "P. U. M. C. 173–179," situate on easterly boundary of said lot No. 173, from which corner number three, of said lot No. 173, bears south eight (8) degrees, thirty (30) minutes east at the distance of two hundred and nineteen (219) feet, seven hundred and sixty-eight (768) feet to a granite stone 18 x 8 x 6
23 inches in size marked "P. U. M. C. 126–179," situate on easterly boundary of said lot No. 126, from which corner number three of said lot No. 126 bears south eight (8) degrees thirty (30) minutes, at the distance of one hundred and fifty (150) feet eleven hundred and sixty-eight (1168) feet to a granite stone 18 x 8 x 8 in size, marked "P. U. M. C. 173–79," situate on northerly boundary of said lot No. 173, from which point of intersection of westerly boundary of this claim, with the northerly boundary of said lot No. 173, bears south eighty-five (85) degrees thirty (30) minutes west at the distance of one hundred and seventy-four (174) feet; twelve hundred and seventy-eight (1278) feet to a granite stone 16 x 10 x 6 inches in size, marked "P. U. M. C. 126–179," situate on northerly boundary of said lot No. 126, from which the point of intersection of westerly boundary of this claim with the northerly boundary of said lot No. 126 bears south seventy-two (72) degrees, west at the distance of fifty-six (56) feet, thirteen hundred and eighteen (1318) feet, to the place of beginning, containing two and ninety-eight-hundredths ($2_{1\,0\,0}^{9\,8}$ths) acres of land, more or less and embracing thirteen hundred and eighteen (1318) linear feet of the said Rarus lode, as represented by yellow shading in the following plat:

(Here follows map marked p. 24.)

13778

No. 330.
B+M.C.C.V.S.Mc Co
v.
C.G.M. Co et al.
} f. 24

Plat

of the claim of

STANISLAS E. HIRBOUR ET AL

upon the

Rarus Lode

Summit Valley Mining District, Silver Bow County, Montana.

Containing 298 Acres.

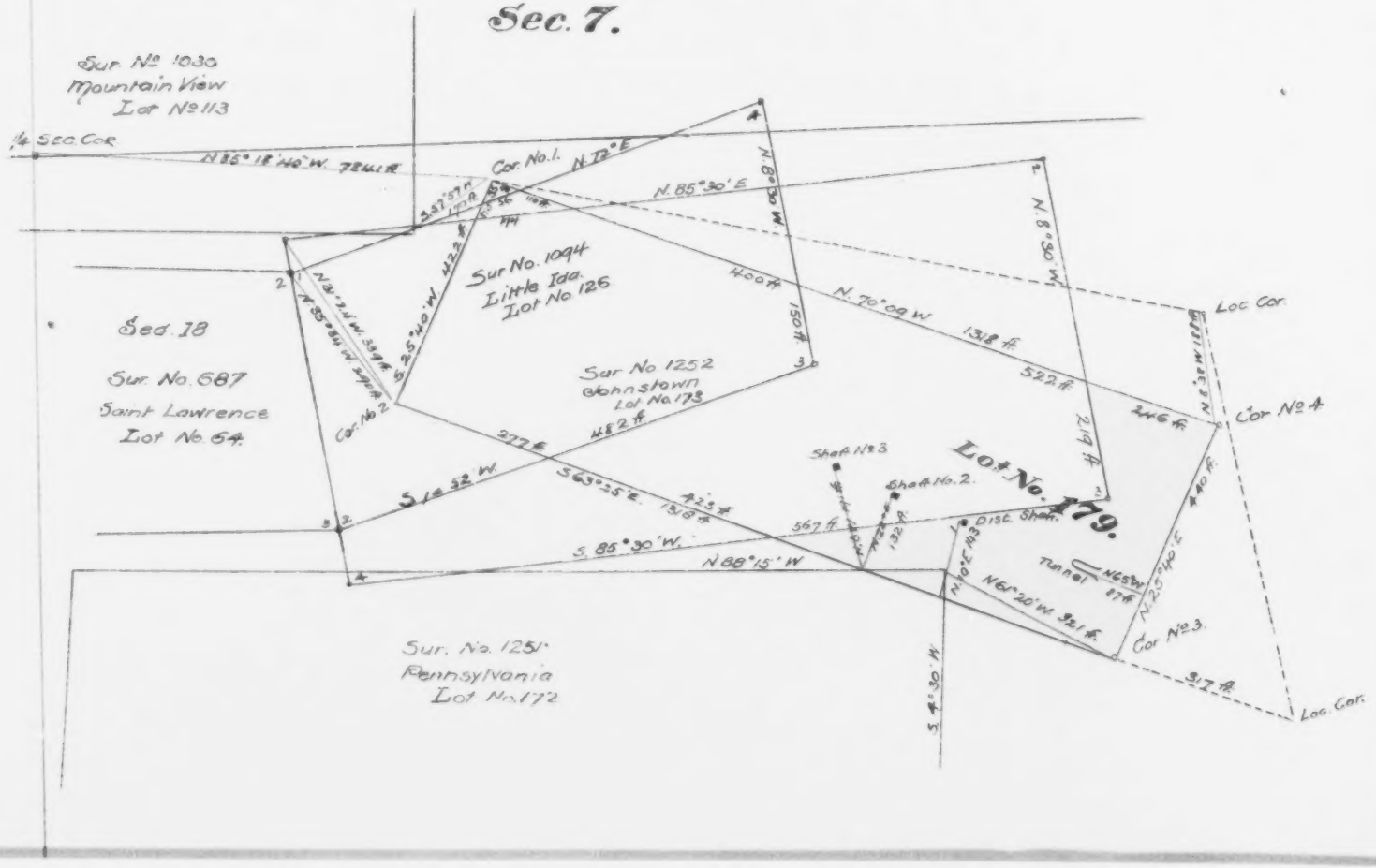
Scale 200 ft to an Inch.

VAR. 20° E.

T. 3. N. R. 7. W.

(Surveyed)

Sec. 7.



25 Now know ye, that the United States of America, in consideration of the premises, and in conformity with said Revised Statutes of the United States, have given and granted, and by these presents do give and grant, unto the said Stainslas E. Hirbour, Joseph Ortyer, Eugene Fournier, Peter Tetrault, and the heirs of Michael Roy, deceased, and to their heirs and assigns, the said mining premises hereinbefore described as lot No. 179, embracing a portion of section eighteen (18) in township three (3) north of range seven (7) west of the principal meridian, with the exclusive right of possession and enjoyment of all the land included within the exterior lines of said survey not herein expressly excepted from these presents, and of thirteen hundred and eighteen (1318) linear feet of the said Rarus vein, lode, ledge, or deposit for the length hereinbefore described, throughout its entire depth, although it may enter the land adjoining, and also of all other veins, lodes, ledges or deposits throughout their entire depth, the tops or apexes of which lie inside the exterior lines of said survey at the surface extended downward vertically, although such veins, lodes, ledges, or deposits in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said survey; provided, that the right of possession hereby granted to such outside parts of said veins, lodes, ledges or deposits, shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said survey at the surface, so continued in their own direction that such vertical planes will intersect such exterior parts of said veins, lodes, ledges or deposits. Excepting and excluding, however, from these presents, all that portion of the surface ground hereinbefore

26 described, which is embraced by said lots Nos. 126, 172, and 173. And provided further, that nothing in this conveyance shall authorize the grantees herein, their heirs or assigns, to enter upon the surface of a mining claim owned or possessed by another: To have and to hold, the said mining premises, together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging unto the said Stanislas E. Hirbour, Joseph Ortyer, Eugene Fournier, Peter Tetrault, and the heirs of Michael Roy, deceased, and to their heirs and assigns forever, subject nevertheless, to the following conditions and stipulations:

First. That the grant hereby made is restricted to the land hereinbefore described as lot No. 179, with thirteen hundred and eighteen (1318) linear feet of the Rarus vein, lode, ledge, or deposit for the length aforesaid throughout its entire depth as aforesaid, together with all other veins, lodes, ledges, or deposits throughout their entire depths, as aforesaid, the tops or apexes of which lie inside the exterior lines of said survey.

Second. That the premises hereby conveyed, with the exception of the surface, may be entered by the proprietor of any other vein, lode, ledge or deposit, the top or apex of which lies outside the exterior limits of said survey, should the same in its downward course be found to penetrate, intersect, extend into, or underlie the premises

hereby granted, for the purpose of extracting and removing the ore from such other vein, lode, ledge or deposit.

Third. That the premises hereby conveyed shall be held subject to any vested and approved water rights for mining, agriculture, manufacturing or other purpose, the rights to ditches and reservoirs used in connection with such water rights as may be
27 recognized and acknowledged by the local laws, customs and decisions of courts.

Fourth. That in the absence of necessary legislation by Congress, the legislature of Montana may provide for working the mining claims or premises hereby granted, involving easements, drainage and other necessary means to its complete development.

In testimony whereof, I, Chester A. Arthur, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, the twenty-fifth day of June, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States one hundred and eighth.

By the President,

CHESTER A. ARTHUR,
By W. H. COOK, *Secretary.*

[General Land Office Seal.]

S. W. CLARK,
Recorder of the General Land Office.

"Examined." Recorded, vol. 112, pages 345 to 348, inclusive. Filed for record, February 23rd, A. D. 1895, at fifty minutes past nine o'clock a. m.

C. Q. JOHNSON,
County Recorder,
By A. E. WHIPPS, *Deputy.*

STATE OF MONTANA, } ss :
County of Silver Bow, }

I, John Weston, county clerk and recorder of said county, do hereby certify that the annexed instrument is a full, true and correct copy of the original instrument, as recorded at page
28 190 in Book C of U. S. Patents, Records of Silver Bow County, Montana.

Attest my hand and seal of said Silver Bow county hereunto affixed this 18th day of May, 1897.

JOHN WESTON,
County Clerk and Recorder,
By J. E. MORAN, *Deputy.*

COMPLAINANTS' EXHIBIT "B."

UNITED STATES OF AMERICA.

General Land Office No., 9893; mineral certificate No. 1012.

To all to whom these presents shall come, Greeting:

Whereas in pursuance of the provisions of the Revised Statutes of the United States, chapter VI, title 32, there has been deposited in the General Land Office of the United States, the plat and field-notes of survey of the claim of William Harris, Sr., William Harris, Jr., John E. Lloyd, Thomas E. Lloyd, Jeremiah Griffith, Thomas Griffith and John H. Davis, upon the Johnstown lode, accompanied by the certificate of the register of the land office at Helena, in the Territory of Montana, whereby it appears that, in pursuance of the said Revised Statutes of the United States, the said William Harris, Sr., William Harris, Jr., John E. Lloyd, and David J. Lloyd, Thomas E. Lloyd, Jeremiah Griffith, Thomas Griffith and John H. Davis, did, on the first day of December, A. D. 1883, enter and pay for said mining claim or premises, being mineral entry No. 1012
29 in the series of said office, designated by the surveyor general as lot No. 173, embracing a portion of section eighteen (18), in township three (3) north of range seven (7) west of the principal meridian in the Summit Valley mining district, in the county of Silver Bow and Territory of Montana, in the district of lands subject to sale at Helena, containing eighteen acres of land, more or less, and according to the returns on file in the General Land Office, bounded, described and platted as follows, with magnetic variations as hereinafter stated, to wit: Beginning at corner number one, a granite stone 19 x 10 x 6 inches in size, "I. M. C. 173," from which the quarter-section corner on north boundary of section eighteen in township three (3) north of range seven (7) west of the principal meridian bears, with magnetic variation at twenty degrees east, north 69 degrees, 49 minutes, and 27 seconds west at the distance of (449.7) four hundred and forty-nine and seven-tenths feet, corner number two of lot number one hundred and twenty-seven (127), the Smelter Lode claim bears north 63 degrees east at the distance of two hundred and eighteen (218) feet, and corner number one of lot No. 113, the Mountain View Lode claim bears east at the distance of two hundred and twenty-three (223) feet; thence, from said corner number one, north 85 degrees and 30 minutes east, seventy-three (73) feet to a granite stone 18 x 8 x 6 inches in size, marked "P. I. M. C. 113–173," situate on southerly boundary of said lot No. 113, from which corner number one of said lot 113, bears south 87 degrees, 30 minutes east at the distance of 145 feet and the point of intersection of the southerly boundary of said lot No. 113, to the northerly boundary of lot No. 126, the Little Ida Lode claim, bears south 87 degrees, 30 minutes east at the
30 distance of 100 feet; 919 feet to a granite stone 16 x 12 x 10 inches in size, marked "P. I. M. C. 113–126 and 173," situate

on easterly boundary of said lot No. 113 and northerly boundary of said lot No. 113 bears south 2 degrees, 30 minutes west at the distance of seventeen (17) —, eight hundred and fifty-seven feet to a granite stone 16 x 6 x 5 inches in size, marked "P. U. M. C. 126–173," situate on the easterly boundary of said lot No. 126, bears south eight degrees 30 minutes east, at the distance of 316 feet, thirteen hundred and seventeen feet (1317) to corner number two, a granite stone 18 x 10 x 8 inches in size, marked "M. C. 173;" thence south eight degrees 30 minutes east 600 feet to corner number three, a granite stone 26 x 12 x 6 inches in size, with mound of stones, marked "3 M. C. 173;" thence south eighty-five deg. 30 min. west ten hundred and eighty-five feet to a granite stone 24 x 16 x 6 inches in size, marked "P. I. M. C. 172–173," situate on north boundary of lot number 172 the Pennsylvania Lode claim, thirteen hundred and seventeen (1317) feet to corner number four a granite stone 30 x 12 x 10 inches in size with mound of stones, marked "4 M. C. 173," from which the face of a tunnel bears, with magnetic variation of nineteen degrees, 45 minutes east, south 6 degrees east at the distance of six hundred and thirty-nine (639) feet, and corner number one of said lot No. 172 bears north eighty-five degrees, 15 minutes west at the distance of four hundred and sixty-one (461) —; thence from said corner number four, north eight degrees, thirty minutes west twenty-five feet to a granite stone 18 x 8 x 6 inches in size, marked "P. I. M. C. 172–173," situate on northerly boundary of said lot No. 172, from which corner number one of said lot No. 172 bears north eighty-eight degrees, 15 minutes west at the distance of four hundred and fifty-six —, and the point
31 of intersection of northerly boundary of said lot No. 172 with southerly boundary of this claim, bears south 88 degrees, 15 minutes east at the distance of two hundred and thirty-five feet; ninety-three feet to corner number three of lot number 64 the St. Lawrence Lode claim, and also corner number two, of said lot No. 126, from which corner number three of said lot No. 126 bears north 72 degrees, 52 minutes east at the distance of eight hundred and sixty-five (865) feet, three hundred (300) feet to a point, from which discovery shaft bears north 85 degrees, 30 minutes east at the distance of two hundred and fifty (250) feet, five hundred and forty-six (546) feet to corner number two of said lot number sixty-four, and also corner number one of said lot No. 126, from which the point of intersection of the southerly boundary of said lot No. 113, with the northerly boundary of said lot No. 126, bears north 72 degrees at the distance of one hundred and seventy-four (174) feet, and the point of intersection of the northerly boundary of said lot with the northerly boundary of this claim and easterly boundary of said lot No. 113, bears north 72 — east at the distance of two hundred and twenty-two feet; six hundred feet to the place of beginning, containing eighteen (18) acres of land, more or less, and embracing thirteen hundred and seventeen (1317) linear feet of the said Johnstown lode, as represented by yellow shading in the following plat:

(Here follows map marked p. 35.)

PLAT

OF THE CLAIM O

WILLIAM HARRIS.

upon the

JOHNSTOWN.

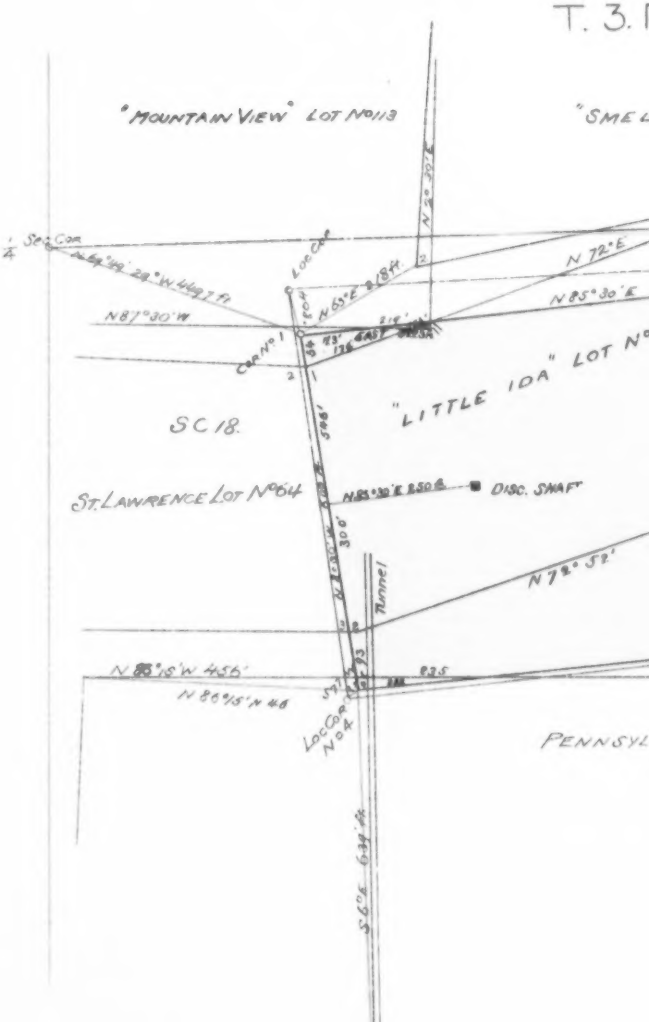
SUMMIT VALLEY MINING DIST

MONTANA

CONTAINING 18 00 ACRES.

VAR — E

T. 3.



No. 330
B the C.C. and M.C. } p. 35
& C.G. M. Co. et al.

M OF
IS. SE et al.

N. LODE

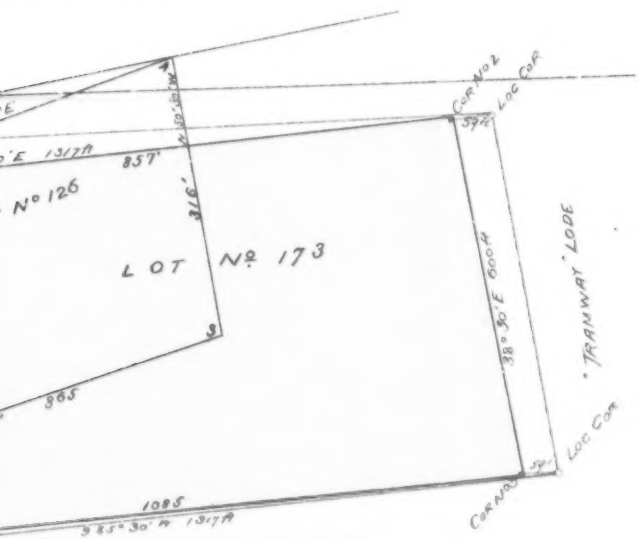
DISTRICT SILVER BOW COUNTY.
NA

SCALE 200 Ft. to an inch

-E

3. N. R. 7. W.

MELTER" LOT No 127



SYLVANIA" LOT No 172

Now know ye; that the United States of America, in consideration of the premises, and in conformity of the said Revised Statutes of the United States, have given and granted, and by these presents do give and grant unto the said William Harris, Sr., William Harris, Jr., John E. Lloyd, David J. Lloyd, Thomas E. Lloyd,
32 Jeremiah Griffith, Thomas Griffith and John H. Davis, and to their heirs and assigns the said mining premises hereinbefore described as lot No. 173, embracing a portion of section eighteen (18) in township three north of range seven west of the principal meridian, with the exclusive right of possession and enjoyment of all the lands included within the interior lines of said survey not herein expressly excepted from these presents and of thirteen hundred and seventeen (1317) linear feet of the said Johnstown vein, lode, ledge or deposit for the length hereinbefore described, throughout its entire depth, although it may enter the land adjoining, and also of all veins, lodes, ledges or deposits throughout their entire depth, the tops or apices of which lie inside the exterior lines of said survey at the surface extended downward vertically, although such veins, lodes, ledges, or deposits in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said survey, provided that the right of possession hereby granted to such outside parts of said veins, lodes, ledges or deposits shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said survey at the surface, so continued in their own direction that such vertical planes will intersect such exterior parts of said veins, lodes, ledges or deposits; excepting and excluding, however, from these presents all that portion of the surface ground hereinbefore described which is embraced by said lots No. 113 and 172. And provided, further, that nothing in this conveyance shall authorize the grantees herein, their heirs or assigns, to enter upon the surface of a mining claim owned or possessed by another; to have and to hold said mining premises, together with all the rights, privileges,
33 immunities and appurtenances of whatsoever nature thereunto belonging unto the said William Harris, Sr., William Harris, Jr., John E. Lloyd, David J. Lloyd, Jeremiah Griffith, Thomas Griffith and John H. Davis, and to their heirs and assigns forever, subject nevertheless to the following conditions and stipulations:

First. That the grant hereby made is restricted to the land hereinbefore described as lot No. 173 with thirteen hundred and seventeen (1317) linear feet of the Johnstown vein, lode, ledge or deposit for the length aforesaid, together with all other veins, lodes, ledges, or deposits, throughout their entire depths as aforesaid, the top or apices of which lie inside the exterior lines of said survey.

Second. That the premises hereby conveyed, with the exception of the surface, may be entered by the proprietor of any other vein, lode, ledge or deposit, the top or apex of which lies outside the exterior limits of said survey, should the same in its downward course be found to penetrate, intersect, extend into or underlie the

premises hereby granted, for the purpose of extracting and removing the ore from such vein, lode, ledge or deposit.

Third. That the premises hereby conveyed shall be held subject to any vested and accrued water rights for mining, agriculture, manufacturing, or other purposes and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local laws, customs and decisions of courts.

Fourth. That in the absence of necessary legislation by Congress, the legislature of Montana may provide rules for working the mining claim or premises hereby granted involving easement, drainage and other necessary means to its complete development.

In testimony whereof, I, Chester A. Arthur, President of the
34 United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, the fifteenth day of November, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States the one hundred and ninth.

By the President,

CHESTER A. ARTHUR,
By M. McKEAN, *Secretary.*

[Seal of the General Land Office.]

S. W. CLARK,
Recorder of the General Land Office.

Recorded vol. 117, pages 329 to 333 inclusive. Examined. Filed for record March 12th, A. D. 1890, at five minutes past two o'clock p. m.

C. F. BOOTH,
County Recorder.

STATE OF MONTANA, } ss:
County of Silver Bow, }

I, John Weston, county clerk and recorder in and for said county and State, do hereby certify that the annexed instrument is a full, true and correct copy of the original instrument as recorded at page 29 in Book B of U. S. Patents, records of Silver Bow county, Montana.

Attest my hand and the seal of said Silver Bow county hereunto affixed this 26th day of March, A. D. 1897.

JOHN WESTON,
County Clerk and Recorder,
By A. E. WHIPPS, *Deputy.*

(Endorsed:) Title of court and cause. Bill of complaint. Filed April 15th, 1898. Geo. W. Sproule, clerk, by Charles W. Blair, deputy clerk.

36&37 And thereafter, to wit, on the 29th day of April, 1898, the answer of defendant, Chile Gold Mining Company, was filed, which is in the words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana, Southern Division. In Equity.

BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER Mining Company, Plaintiff,
vs.
CHILE GOLD MINING COMPANY, JOHN MACGINNISS, Edward L. Whitmore, Carlos Warfield, and Stephen S. Raymond, Defendants. } No. 66.

Separate Answer of Defendant Chile Gold Mining Company.

This defendant, Chile Gold Mining Company, now and at all times hereinafter saving to *themselves* all, and all manner of benefit and advantage of exceptions that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill of complaint, for answer thereto, or so much thereof as this defendant is advised it is material or necessary for it to make answer to, answering says:

That it admits that the complainant is a corporation organized and existing under and by virtue of the laws of the State of Montana, with its principal place of business at Butte city, Silver Bow county, in said State.

That this defendant is now and at all times mentioned in said complaint was a corporation duly organized and existing
38 under and by virtue of the laws of the State of Montana, having its principal place of business at Butte city, Silver Bow county, State of Montana.

Admits that the defendants, Edward L. Whitmore and Carlos Warfield, are officers of this defendant, The Chile Gold Mining Company, and in charge of its operation and affairs, but denies that said Stephen S. Raymond is or was at the commencement of this suit an officer of this defendant or in charge of any of its affairs.

Admits that the complainant is the owner of the surface ground of that portion of the Pennsylvania Lode claim described in its complaint, but denies that the complainant is the owner of or entitled to the lode, or vein, or ore bodies upon which this defendant has entered and from which it has extracted the ores in question in this case, and alleges that the Montana Ore Purchasing Company, a corporation duly organized and existing under and by virtue of the laws of the State of Montana, having its principal place of business at Butte city, in said State, is the owner of said veins or lodes and ore bodies.

Admits that complainant acquired title to the surface of the Pennsylvania Lode claim by virtue of several deeds of conveyance set out in its bill of complaint.

Denies that on or about the 1st day of April, 1895, or at any other

time, or at all, this defendant, Chile Gold Mining Company, wrongfully or unlawfully entered upon or into the premises of the complainant, to wit, the said Pennsylvania Lode claim described in said complaint, by underground workings, or tunnels, or shafts, or crosscuts, or levels, or otherwise, or at all, or extracted therefrom large or any quantities of valuable or other ores containing copper, silver, or other precious metals, against the will, wish and consent of plaintiff.

39 Denies that by means of these underground workings or otherwise, or at all, this defendant has extracted from within the limits of this plaintiff's said premises, the Pennsylvania Lode claim, ten thousand tons, or any other number of tons of ore, more or less, of the reasonable value of seventy-five thousand dollars ($75,000), or of any value whatever, or has converted the same to its own use.

Denies that this defendant ever, at any time, or at all, extracted from said Pennsylvania Lode claim any quartz, or ore, or mineral-bearing rock of any kind or description belonging to plaintiff.

Denies that ever since that time, or at all, defendant has continued to mine and extract ores from said premises belonging to the complainants, or is now extracting ores therefrom or threatens so to do, or that it ever or at all mined or extracted ores from said premises belonging to the complainant, or threatened so to do, as alleged in plaintiff's complaint, or otherwise or at all, and denies that it will do so unless restrained by injunction of this court.

Denies that by reason of said trespasses plaintiff has been damaged in the sum of seventy-five thousand dollars ($75,000), or in any sum or amount whatever, or damaged at all, or that this said defendant has not paid the same or any part thereof.

Denies that the determination of said controversy between the said plaintiff and this defendant, The Chile Gold Mining Company, involves a construction of title 23, chapter 6, of the Revised Statutes of the United States, concerning mines and mineral lands, or the construction of any other statute or law of the United States.

40 Admits that the said Pennsylvania Lode claim claimed by plaintiff is a mining claim duly located under the provisions of the statutes of the United States relative to the appropriation of mineral lands, and that the same has been patented as a mining claim under the provisions of the said statutes.

Denies that this defendant, The Chile Gold Mining Company, claims to be the lessee of or to have some interest in a portion of that certain quartz lode mining claim known as and called the Rarus Lode claim, lot No. 179, or claimed to have any interest or right to any portion of the Little Ida Lode claim, lot No. 126, which said claims lie north of and partly adjoining and near the said Pennsylvania Lode claim on the north.

This defendant admits that it claims to be the lessee and to have an interest in a portion of that certain quartz lode mining claim known as and called the Johnstown Lode claim, lot No. 173, lying north of and partly adjoining said Pennsylvania Lode claim.

This defendant admits that the said Rarus Lode claim, Johnstown

Lode claim, and the Little Ida Lode claim are mineral claims located under the laws of the United States, relative to the appropriation and location of mineral lands, and that they have been patented by the United States to various parties, and that such patents were issued under and by virtue of the statutes of the United States, relative to the patenting of mineral lands upon the public domain.

This defendant denies that it claimed the right and entered upon the premises of the plaintiff, to wit, that portion of the Pennsylvania Lode claim described in plaintiff's complaint, by reason of the fact that certain veins, leased or claimed by this defendant, or in its possession, have their tops or apices within the ground owned or
41 claimed as a part of said Rarus Lode claim, or a portion of the said Ida Lode claim.

Denies that this defendant claims any right whatever under or by virtue of any veins apexing in said Rarus or Ida Lode claims, or claim- any right, title or interest in or to any veins belonging to or the top or apex of which lie within the Rarus or Little Ida Lode claims by this defendant; admits that it claims the right to enter upon the premises claimed by plaintiff, to wit, that portion of the Pennsylvania Lode claim described in complainant's complaint, by reason of the fact that certain veins leased and claimed by this defendant and in its possession have their top or apices within the ground owned and claimed as a part and portion of said Johnstown Lode claim, although the same so far departs from a perpendicular as to depart from the ground inclosed within the exterior line of said Johnstown Lode claim, and enter the premises owned or claimed by the complainant, to wit, that portion of the Pennsylvania Lode claim described in plaintiff's complaint.

This defendant alleges that the veins or lodes upon which it has been mining within the Pennsylvania Lode claim and underneath the surface thereof, have their top or apices within the lines of the Johnstown Lode claim, as located and patented, for the entire length of said claim, and running nearly parallel with the side lines thereof, and that the same passes on their strike through the end lines of the said Johnstown Lode claim and through both end lines thereof and run the full length of said claim as located and patented, and that said lines are parallel, and this defendant further alleges that the veins or lodes upon which it has mined within the
42 Pennsylvania Lode claim have their top or apex within that portion of the Johnstown Lode claim owned by the Montana Ore Purchasing Company and leased by it to this defendant, and that the said veins can be followed, and have been followed continuously, on ore on the dip or downward course from the top or apex thereof within the boundary lines of said Johnstown Lode claim and within the boundary lines of that portion thereof leased by this defendant into the ground owned or claimed by complainant, to wit, the Pennsylvania Lode claim, and this defendant denies that the veins or ores from which it has been extracting ores within the premises of complainant, to wit, the Pennsylvania Lode claim, are broken and intersected by faults or otherwise in such a manner

that the same cannot be traced or followed from the said Johnstown into and beneath the said Pennsylvania Lode claim, and denies that by reason thereof this defendant have not right to enter upon the ground of plaintiff, to wit, the Pennsylvania Lode claim, for the purpose of extracting ores therefrom, by reason of its claim or interest in the apices of any veins within said Johnstown Lode claim.

This defendant denies that the vein or veins upon which it has been extracting ore within the premises of the plaintiff which have their apices within the Johnstown Lode mining claim, do not in their course or strike depart from the end lines of said Johnstown Lode claim, but depart from the side line of said claim in any manner whatever, or so as to prohibit this defendant from following the same beyond the lines of said Johnstown Lode claim under plaintiff's portion of the said Pennsylvania Lode claim.

43 Defendants admit that there are several veins which this defendant claims the right to follow on the dip beyond the side lines of said Johnstown Lode claim into the ground of plaintiff, the said Pennsylvania Lode claim, but denies that neither of said veins in their course or strike depart from the end lines of said Johnstown Lode claim, and denies that said claim was not so located or situated as to have any end lines whatever, as provided by the statutes of the United States in such case, or that in consequence of such failure upon the part of the locator or locators of said Johnstown Lode claim leased by this defendant to mark the same within end lines parallel, or to locate the same along the veins, but on the contrary, having located the same across the veins, that the said Montana Ore Purchasing Company, or this defendant, as its lessee, has no extralateral rights in or to any of the veins in said Johnstown Lode claim, or are not entitled to follow the same into or upon the ground of plaintiff, to wit, the said portion of the said Pennsylvania Lode claim, and this defendant avers the fact to be that said Johnstown Lode claim was so located and patented as to have parallel end lines as provided by the statute of the United States, and that said claim was located along the vein therein and along the tops or apices of the veins upon which this defendant had been mining, in such manner as to entitle this defendant to follow said veins into the earth on their dip, although they may so far depart from said Johnstown Lode claim in their downward course as to pass beyond the side lines thereof and enter beneath the surface of said Pennsylvania Lode claim.

44 This defendant admits that a patent was issued by the United States of America to Stanislas E. Hirbour and others to that certain quartz lode mining claim known as and called the Rarus Lode claim, referred to in plaintiff's complaint, and a copy thereof is attached to and made a part of plaintiff's complaint.

Defendant further admits that a patent has been issued by the United States of America to William Harris, Sr., and others to that certain quartz lode mining claim known as and called the Johnstown Lode mining claim, and that a copy of said patent is attached to plaintiff's complaint and marked Exhibit "B."

This defendant admits that it claims to be a lessee and to have an interest in a portion of the ground patented under the said Johnstown Lode claim, but denies that it has or claims any right whatever or interest in any portion or part of the ground patented as the Rarus Lode claim, and denies that this defendant as such lessee, or otherwise, or at all, has acquired or claimed to acquire thirteen hundred linear feet of what is designated or called the Rarus Lode claim, or any other number of feet belonging to said Rarus Lode claim.

This defendant does not know and does not claim to know how much surface ground was patented to the Rarus Lode claim, and has no knowledge in regard thereto from which it can form an opinion.

This defendant further represents that as it claims no right, title or interest whatever, as lessee or otherwise, in or to any part or portion of any ground or any lode or veins which have their apices in or belonging to said Rarus Lode claim, that it is immaterial so far as this defendant is concerned, how much ground was really patented and granted in the patent of the Government of the United States to the said Rarus Lode claim.

This defendant admits that a large portion of the ground
45 which was originally included within the location of the Rarus claim have been patented under the Johnstown patent, and defendant denies that it contends or claims that only the surface ground of the Johnstown claim was patented to the patentee therein, or that all or any vein lying within the original location lines of the Rarus claim were granted by the Rarus patent, and denies that it claims or contends that it is entitled to claim the veins extending through the Johnstown claim under and by virtue of the Rarus patent, or that its extralateral rights should be determined by the Rarus patent and not by the Johnstown patent, but defendant alleges that it contends and claims that its extralateral rights to the veins in question should be determined by the ownership of the Montana Ore Purchasing Company and by this defendant's lease from said company of that parcel of ground now included within the Johnstown claim and leased by the owner thereof to this defendant, and not by the Rarus lode or patent, for the reason that said veins or lodes have their tops and apices within the ground belonging to said Johnstown Lode claim and leased to this defendant by said owner thereof.

This defendant admits that so far as it is concerned all extralateral rights to which it is entitled, and its right to follow the veins, the apex of which is in the Johnstown Lode claim, to the point where the ore sued for in this case was extracted, should be governed and regulated by the rights conveyed by the United States in the Johnstown patent, and not under or by virtue of the Rarus patent or any part thereof, or any veins belonging thereto; and defendant denies that it contends it has a right to follow said vein- or any of them in their downward course by reason of the Johnstown and Rarus patents combined, and deny that this
46 defendant has no right to follow any vein having its apex within the Johnstown Lode claim under any circumstances,

into or under said Pennsylvania Lode claim, at any point east of the intersection of the south line of the Johnstown patent to the side line of the original Rarus location.

This defendant denies that it contends or claims that the plaintiff cannot, under any circumstances, obtain any relief for ores extracted within that portion of the premises owned by it without first showing that the apices of the veins from which the ores were extracted are within the surface lines of the ground owned and claimed by plaintiff, and admits that the *prima facie* plaintiff is the owner of all ores within the boundaries of its claim extended downward vertically into the earth until it has been shown that some other person or persons has some right thereto by reason of the ownership of the apices of the veins within some other claim.

Defendant denies that it is claimed by this defendant that the apex of the veins from which the ores in question were extracted is divided in that a portion thereof is claimed by the Rarus Lode claim, and a portion thereof by the Johnstown Lode claim, and a portion thereof by the Pennsylvania Lode claim, but this defendant avers the fact to be that it only claims a right to such veins as apex within the Johnstown Lode claim and that portion thereof owned by the Montana Ore Purchasing Company, and this defendant denies that it claims by reason of a divided apex that it may claim the right to follow the said vein or any vein beneath the surface and without the side lines of the Rarus and Johnstown Lode claims under and by virtue of either or both of said claims or patents at its election or at all. Defendant denies that if any such vein
47 exists that it is claimed by this defendant that it has any extralateral rights by reason of the fact that the same has a divided apex.

This defendant denies that there is involved in this suit, or the matter in controversy between plaintiff and this defendant, numerous or any Federal questions named in said complaint or at all, and denies that there is involved the construction of the statutes of the United States relative to the locating, purchasing or patenting of mineral lands, or their construction of such statutes relative to the right of one claimant to follow veins down to and into the premises of another under the circumstances and situations of the parties in this action or the construction of said statute- in relation to the patenting of claims, or whether the vein can be patented to one person and the surface to another, or to the right of the Land Department to segregate the surface of the mineral in the ground, granting one to one person and the other to another, and as to whether said action is authorized under and by virtue of said statutes, and also as to whether when an apex of a vein is divided on the surface, part being within the premises granted in one patent and a part within another, as to what, if any, extralateral rights are granted under said circumstances.

Defendant denies that the construction of any law of the United States or any Federal question whatever is involved in this suit. This defendant avers that there is no controversy between the complainants and this defendant in this action about any of the mat-

ters or things suggested or stated by the complainant for the purpose of showing that this court has jurisdiction. This defendant,
48 therefore, asserts that this court has no jurisdiction of the subject-matter of this action, or the controversies between the complainant and defendant herein.

This defendant further alleges that on or about the 24th day of January, 1879, John E. Lloyd, David J. Lloyd, Thomas E. Lloyd, William Harris, Sr., William Harris, Jr., and John H. Davis duly located the Johnstown Lode claim, lot No. 173, township three (3), north range seven (7) west, Silver Bow county, Montana, by compliance with all and singular the requirements of an act of Congress and the local rules, regulations and acts of the Territory of Montana; that said location was so laid along the veins or lodes in said claim, that said veins or lode in their course or strike were substantially parallel to the side lines of said claim and departed from said Johnstown Lode claim through both end lines thereof, and that said lode claim was so located that its end lines marked upon the ground were parallel to each other.

That subsequently thereto such proceedings were had in the United States Land Office, that a United States patent was issued to the owners of said Johnstown Lode claim. That the surface so patented conforms in extent and boundaries to the location thereof theretofore made as above alleged, and that the end lines, as described in said patent, were and are parallel to each other, that there was a vein or lode containing valuable metals discovered and located within the boundaries of said claim, and that the same has its apex therein, and on its course or strike departed from both end lines of the Johnstown Lode claim, as patented. That the said locators of the said Johnstown Lode claim were at the time said location was made, the owners of the said Pennsylvania Lode claim, the greater portion of which is now claimed by the complainant and described in its bill of complaint herein.
49 That on or about the 7th day of March, 1883, the owners of the Johnstown Lode claim and the Pennsylvania Lode claim were the same persons. That the then owners of the Johnstown Lode claim and the Pennsylvania Lode claim, for a valuable consideration conveyed to the predecessors in interest of the Montana Ore Purchasing Company a certain parcel of ground within the lines of the said Johnstown Claim, which portion is specifically described in the deed of conveyance therefore made, executed and delivered by said party to the predecessors in interest of this defendant, as follows: All their right, title and interest, estate, claimed and demanded of the said parties of the first part, of, in and to that certain portion claimed, and mining right, title and property of that certain ledge, vein, lode or deposit of quartz and other rock in place containing precious metals of gold, silver and other metals, and situated in Summit Valley mining district, Silver Bow county, Montana, and described as follows, to wit: Beginning at the southeast corner of lot No. 173, a granite stone 26 x 12 x 6 inches, 20 inches deep, with mound of stone 2½ feet high, 4½ feet base alongside the stone, and running thence north 8 degrees, 30 minutes west 219 feet; thence

north 70 degrees 9 minutes west 522 feet, from which corner number one of lot No. 179 bears north 70 degrees 9 minutes west 552 feet distant; thence south 74 degrees 33 minutes west 329 feet; thence south 25 degrees 40 minutes west 235 feet; thence south 69 degrees 25 minutes east 400 feet; thence north 85 degrees 30 minutes east 567 feet to the place of beginning, containing an area of six and eighty-six-hundredths (6.86) acres, all right, title and interest that is now possessed, together with any that may hereafter accrue
50 through application No. 1265, made to the United States Government by the grantors herein for patent No. 173, together with all the dips, spurs and angles, and also all metals, ores, gold, silver and metal-bearing quartz, rock and earth therein, and all the rights, privileges and franchises thereto appertaining, or usually had and enjoyed, and also all the estate, right, title and interest above claimed and demanded whatsoever of said parties of the first part, of, in and to the premises and every part and parcel thereof.

That the predecessors in interest of this defendant immediately after the purchase, entered into the possession of the premises so conveyed as aforesaid, and that thereafter said Montana Ore Purchasing Company became the owners thereof, and at all times herein and at all times named in said bill of complaint, has been and now is the owner, in possession and entitled to the possession thereof.

And this defendant further alleges that at the time said deed, dated the 7th day of March, 1883, was executed and delivered, the grantors therein were the owners of the Pennsylvania Lode claim and also the owners of the Johnstown Lode claim, and that by said deed the grantors therein, and the predecessors in interest of complainant in this case, conveyed to the predecessors in interest of this defendant all leads, lodes and ledges, within their dips, spurs and angles, beneath the surface of the Pennsylvania Lode claim which might have their tops or apices within that parcel of ground conveyed by said deed, and that the conveyance of said veins lodes and ledges beneath the surface of the Pennsylvania Lode claim was made by the predecessors in interest of the complainant wholly without regard to the strike of said veins, lodes or ledges, and wholly without regard to
51 whether or not they departed or might depart through any particular line or lines of the Johnstown lode; that by said conveyance the predecessors in interest of the complainant, then and there conveyed to the predecessors in interest of this defendant the said leads, veins and ledges which are now claimed by the complainant in this case, and that ever since said time down to the commencement of this action, this defendant and its predecessors in interest have been, and this defendant now is in possession and entitled to the possession of whatever leads, lodes and ledges, or veins may occur beneath the surface of the Pennsylvania Lode claim which have their tops or apices within the premises conveyed by said deed and described in the lease made by said Montana Ore Purchasing Company to this defendant, a copy of which is hereto attached, and which premises lie inside the Johnstown Lode claim regardless of the fact that they may or may not depart through any par-

ticular line of said Johnstown claim, or as to whether or not they depart through the end lines or side lines thereof. That subsequent and after the date of said deed to the predecessors in interest of this defendant and after the said deed had been recorded in the office of the county clerk and recorder of Deer Lodge county, Montana, the county in which said premises were then situated, the grantors named in said deed conveyed to the predecessors in interest of complainant all the remainder of their right, title and interest at the time of the conveyance in and to that portion of the Pennsylvania Lode claim by complainant, and this defendant alleges that by virtue of such conveyance to the predecessors in interest of the complainant in this action, this complainant and its predecessor-in interest, acquired no right title or interest whatever, in or to any of the leads, lodes, veins, ledges or mineral deposits which
52 lie beneath the surface of the Pennsylvania Lode claim which have their tops or apices within that parcel of ground conveyed to the predecessors in interest of this defendant by said deed of March 7th, 1883, and which lies within the Johnstown Lode claim, for the reason that at the time the said conveyance was made to the predecessors in interest of said complainant, the grantors in said conveyance were not owners in the possession or entitled to the possession of any of the leads, lodes, veins, ledges or mineral deposits, with their dips, spurs or angles, beneath the surface of the Pennsylvania Lode claim, which had their tops or apices within the premises conveyed to the predecessors in interest of this defendant as aforesaid, and for the reason that the predecessors in interest of defendant were at the time the owners, in possession and entitled to the possession of the same under said deed of conveyance, and that they and this defendant have been ever since said time, so the owner-, in possession and entitled to the possession of the same.

This defendant further alleges that under and by virtue of said deed of conveyance for said portion of the Johnstown Lode claim, hereinbefore mentioned, that the said Montana Ore Purchasing Company is the owner and entitled to all the veins, lodes, ledges and deposits within or having their tops or apices within the said portion of the Johnstown Lode claim throughout the entire length together with all the dips, spurs and angles, and also all the metals, ores, gold and silver bearing quartz rock and earth therein, although the same may depart on their downward course from within the lines of that portion of the Johnstown Lode claim, and enter beneath the surface of the Pennsylvania Lode claim, and that said com-
53 plainant, by reason of the fact that said Johnstown Lode claim was located by the persons before named, and that said persons were the owners thereof, and of the Pennsylvania lode at the time the said above-mentioned deed was executed and delivered to the predecessors in interest of this defendant, and by reason of the execution and delivery of said deed are estopped from denying its right thereunto or to any of the veins, lodes or ledges dipping under the surface of the Pennsylvania Lode claim but apexing in said premises described in said deed. This defendant hereby ex-

pressly disclaims any and all right to mine and extract the ore fo
which this suit was brought under and by virtue of any right, title
or interest whatever, of the Rarus or Little Ida Lode claims, and
hereby disclaims all right, title and interest in or to any part or por
tion of said Rarus or Little Ida Lode claim, not only in this suit bu
in any or all suits which may be instituted in this or any othe
State or Federal court, and relies entirely upon whatever right
this defendant has by reason of the lease hereinafter named
made to this defendant by the Montana Ore Purchasing Company
the owners of that portion of the Johnstown Lode claim therein
mentioned.

This defendant avers the fact to be that on the 26th day of March
1898, the said Montana Ore Purchasing Company then and now
being the owners of the said portion of the Johnstown Lode claim
named in said lease, made, executed and delivered to this defendant
a certain contract and lease in writing and an amendment thereto
to that certain portion of the Johnstown Lode mining claim de
scribed in said lease, a copy of which lease and amendment are
hereto attached, marked respectively Exhibits "A" and "B"
54 and made a part hereof, and that this defendant thereafter
under and by virtue of the provisions and terms of said lease
entered into and upon that portion of the said Johnstown Lode
mining claim described in said lease, and proceeded to mine and
extract the ore therefrom, and so mining entered upon and beneath
the surface of said Pennsylvania Lode claim and extracted the ore
for which this suit is brought, and continued to so mine and extract
such ore until enjoined by this court.

That said ore, so extracted was taken from veins having their tops
or apices within said Johnstown Lode claim and within that portion
thereof leased to this defendant, and said veins can and have been
followed unbroken and upon ore all the way from said apices within
the surface lines of said Johnstown Lode claim down to the point
where this defendant extracted said ore.

That said ore so extracted by this defendant amounted to eighty
two hundred and thirty-four tons and no more, and was of the value
of thirty thousand, two hundred and eighty-seven and seventy-two
hundredths dollars, and no more; and defendant further alleges
that by reason of said lease from said Montana Ore Purchasing Com
pany, a copy of which lease is hereunto attached, marked "Exhibit
A" and made a part of this answer, that this defendant had the legal
right to mine and extract said ore.

This defendant further represents that if, by the injunction o
this court, that it shall be restrained and enjoined from continuing
and mining and extracting said ore, that it will be greatly and irre
mediably damaged for the reason that when the time mentioned in
said lease expires, that this defendant will have no right
55 whatever to enter into or upon said premises and extract any
ore whatever. That said premises, at the expiration of this
lease, will revert to said Montana Ore Purchasing Company, and
this defendant will have no*t* further right or interest therein. That
there is great profit in mining and extracting said ore under and

by virtue of said lease, and this defendant, if allowed to continue to mine and extract said ore, will make and realize from such work and mining the sum of $16.427 and $\frac{26}{100}$ dollars per week net profit, but if this defendant shall be enjoined from continuing to work said premises under and by virtue of said lease until the same expires, that they will be deprived of said profit which they otherwise would and can make under said lease, and will be damaged in the sum of one million two hundred and fifty dollars.

Wherefore, having fully answered to complainant's complaint herein and admitted or denied the averments thereof, this defendant prays to be hence dismissed with its reasonable cost and expense in this behalf most wrongfully sustained.

CHILE GOLD MINING COMPANY,
By CARLOS WARFIELD, *Its President.*
STAPLETON & STAPLETON,
Of Butte, Montana, Solicitors and Counsel of Defendant Chile Gold Mining Company.

STATE OF MONTANA, }
County of Silver Bow, } *ss:*

Carlos Warfield, being duly sworn on oath deposes and says: That he is an officer of the above-named defendant, a corporation,
56 The Chile Gold Mining Company, to wit: its president. That he has heard read the foregoing answer and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

CARLOS WARFIELD.

Subscribed and sworn to before me this 28th day of April, A. D. 1898.

[SEAL.] G. W. STAPLETON,
Notary Public in and for Silver Bow County, State of Montana.

Service of the foregoing is admitted this 29th day of April, 1898.
FORBIS & EVANS,
Solicitors and Counsel for Complainants Boston & Montana Consolidated Copper and Silver Mining Company.

DEFENDANTS' EXHIBIT "B."

Memorandum of agreement made to correct agreement of lease made on the 26th day of March, A. D. 1898, between the Montana Ore Purchasing Company, a corporation, and the Chile Gold Mining Company, a corporation.

This memorandum witnesseth: That whereas prior to the 26th day of March, an agreement of lease was entered into between the Montana Ore Purchasing Company as party of the first part, and the Chile Gold Mining Company as party of the second part, whereby the said party of the first part leased to the said party of

the second part from that date until the 15th day of September, 1899, all its right to extract ores underneath the surface of
57 the Pennsylvania Lode claim, lot No. 172, which belongs to the first party under that certain deed made on the 7th day of March, in the year one thousand eight hundred and eighty-three, by John Dunstan, *et al.*, to Joseph Ortyer, *et al.*, for that certain piece of mining ground now lying within the Johnstown Lode claim in Summit Valley mining district, Silver Bow county, Montana, and described as follows, to wit:

"Beginning at the southeast corner of lot No. 173, and running thence north 8 degrees 30′ west 219 feet; thence north 70 degrees 9′ minutes west 522 feet from which corner number 1 of lot No. 179 bears north 70 degrees 9′ west 550 feet distant; thence south 74 degrees 33′ west, 329 feet; thence south 25 degrees 40′ west 235 feet; thence south 69 degrees 25′ east, 400 feet; thence north 85 degrees 30′ east, 567 feet to the place of beginning, containing an area of 6 and $\frac{86}{100}$ acres.

Together with all the veins, lodes and ledges therein contain-, with their dips, spurs and angles, and all rights privileges and franchises thereunto incident, appendant and appurtenant, or therewith usually had and enjoyed."

And whereas, on the 26th day of March, 1898, said parties entered into a written lease with reference thereto, which lease contains inaccuracies and mistakes, both with reference to the premises leased and the terms and conditions of said lease, and fails to fully express the understanding and agreement of said parties with reference thereto.

Now, therefore, the said parties in order to correct said lease as reduced to writing, and to make the same fully conform to the understanding and agreement of the parties, and to clearly express their intention and agreement, do hereby correct the same to read as follows:

58 That the said party of the first part, Montana Ore Purchasing Company, a corporation, does hereby lease unto the said second parties on the 26th day of March, 1898, until the 15th day of September in 1899, all the estate, right, title and interest which the said first party has by that reason of its ownership of that portion of the Johnstown Lode claim conveyed to its predecessors in interest on the 7th day of March, 1883, by deed from John Dunstan, *et al.*, to Joseph Ortyer, *et al.*, which is described as follows:

"Beginning at the southeast corner of lot No. 173, and running thence north 8 degrees 30 minutes west 219 feet; thence north 70 degrees 9 minutes west, 522 feet, from which corner number one of lot No. 179 bears north 70 degrees 9 minutes west, 550 feet distant; thence south 74 degrees 33 minutes west, 329 feet; thence south 25 degrees 40 minutes west, 235 feet; thence south 69 degrees 25′ east, 400 feet; thence north 85 degrees 30′ east 567 feet to the place of beginning, containing an area of 6 and $\frac{86}{100}$ acres.

Together with the veins and lodes therein contained, with their dips, spurs and angles, and the rights, privileges and franchises

thereunto incident, appendant, and appurtenant, or therewith usually had and enjoyed."

To extract all of the ores underneath the surface of the Pennsylvania Lode claim, lot No. 172, which belongs to the first party under and by virtue of said deed of conveyance, and its ownership of said portion of the Johnstown Lode claim.

It being intended hereby, to lease to the second party only the right of the first party by virtue of said deed and its ownership of said portion of the Johnstown Lode claim to mine and extract
59 ores and minerals thereto belonging underneath the surface of the Pennsylvania Lode claim. And said second party shall not have the right to mine or extract any of the ores from beneath the surface of the said Pennsylvania Lode claim by reason of any other claim of right or title of the first party, said agreement, lease and these presents being expressly confined to the rights of the first party in the ores underlying the surface of the Pennsylvania Lode claim to the title or right of the first party thereto by reason of its ownership of said portion of the Johnstown Lode claim and said deed before mentioned.

And said first party does further agree that it will hoist all of the ore delivered by the said second party to the first party at the various levels of either Rarus shaft No. 1 or Rarus shaft No. 2, for 10 cts. per ton and that it will pay to the said second party for all ores so delivered at the said shafts, after deducting the cost of hoisting and cost of hauling from the ore-bins on the surface at the said shafts to the works of the first party, nine (9) cents per pound copper contained in all ores running over eight (8) per cent., wet assay, less six dollars ($6.00) treatment, and seven and one-half (7½) cents per pound copper contained in all ores assaying over three (3) per cent. wet assay, and less than eight (8) per cent., after deducting two dollars ($2.00) treatment charge thereon. Nothing to be paid for silver.

And the said second party in consideration for the granting of said lease agrees to at once enter upon the work of mining and extracting the ores by said agreement and lease and hereby leased, and to mine and extract said ores continuously at all times during the period of said lease; and upon its failure for any cause
60 to do so, said lease and agreement may at the option of the said first party be terminated and forfeited.

And the said second party agrees that it will pay to the said first party twenty (20) per cent. of the net proceeds from the operations in the said mine, and that it will under the direction of the agents of the first party maintain all of the workings in and under the said Pennsylvania claim in first-class operating condition, and that it will do such development as to the agents of the first party shall seem proper, and as they may request it to do, paying for the same out of the proceeds of the ore thus extracted and will carry on the work of extracting ore continuously at all times during the period of said lease.

It being expressly understood and agreed, by and between the parties that these presents are made for the purpose of correcting

the written instrument of lease entered into between the parties on the said 26th day of March, 1898, and supplying omissions therein, which occurred through the oversight of the parties, and making the same truly express the intention and agreement of the parties thereto.

These presents shall take effect from the said 26th day of March, 1898, and be considered and construed in connection with said instrument and as a part and correction thereof.

In witness whereof, the parties hereto have caused their respective presidents and secretaries, who are thereto duly author-
61 ized, to execute these presents on this 26th day of April, A. D. 1898.

MONTANA ORE PURCHASING COMPANY,
By F. AUGUSTUS HEINZE, *Pres.* [SEAL.]
[CORPORATE SEAL.] MONTANA ORE PURCHASING CO.
ARTHUR P. HEINZE, *Sec'y.* [SEAL.]
CHILE GOLD MINING COMPANY.
CARLOS WARFIELD, *Pres.* [SEAL.]
E. L. WHITMORE, *Sec'y.* [SEAL.]

COUNTY OF SILVER BOW, } ss:
State of Montana, }

On this 26th day of April, A. D. 1898, before me, John McHatton, a notary public in and for Silver Bow county, Montana, personally appeared F. Augustus Heinze, known to me to be the president and at the same — Arthur P. Heinze known to me to be the secretary of the corporation that executed the within instrument (Montana Ore Purchasing Company), and acknowledged to me that such corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my notarial seal, this 26th day of April, A. D. 1898.

[Notarial Seal.]

(Signed) JOHN McHATTON,
Notary Public in and for Silver Bow County, Montana.

DEFENDANTS' EXHIBIT "A."

Memorandum of an agreement made and entered into this 26th day of March, A. D. 1898, by and between the Montana Ore Purchasing Company, a corporation duly incorporated under and
62 by virtue of the laws of the State of Montana, party of the first part, and the Chile Gold Mining Company, a corporation duly incorporated under and by virtue of the laws of the State of Montana, party of the second part.

Whereas, the above-named party of the first part, by virtue of the conveyance or an agreement to convey, made on the part of the original locators of the Johnstown Lode claim to the locators of the Rarus Lode claim, the predecessors in interest of the said party of the first part, are the owners of a certain part of the said Johnstown Lode claim, lot No. 173, more particularly described as follows:

Beginning at the southeast corner of the said lot and running thence north 8 degrees 30′ west 219 feet; thence north 70 degrees 9′ west 550 feet, from which corner number one of lot No. 179 bears north 70 degrees 9′ west 235 feet; thence south 69 degrees 25′ east 400 feet; thence north 85 degrees 30′ east 567 feet to the place of beginning, containing an area of 6 and $\frac{86}{100}$ acres and all the veins, lodes or deposits which may have their apex or apices within the surface boundaries heretofore more particularly described, although said veins, lodes or ledges so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of the said Johnstown Lode claim; and

Whereas, the said party of the second part is desirous of leasing from the party of the first part, providing it can obtain proper accommodations for the breaking and hoisting of the ore and proper rates of treatment on same, all of the rights of the party of the first part in and to the ores under the surface of the Pennsylvania Lode claim, lot No. 172;

63 Now, therefore, witnesseth, that the said party of the first party does hereby lease unto the said party of the second part from date until the 15th day of September, 1899, the right to extract all of the ores under the surface of the Pennsylvania Lode claim, lot No. 172, which belong to the party of the first part; and does further agree that it will hoist all of the ore delivered by the party of the second part to the party of the first part at the various stations of the Rarus shaft No. 1, or Rarus shaft No. 2, for ten (10) cents a ton, and that it will further agree to pay to the party of the second part for all ores so delivered at the said shafts, after deducting the cost of hoisting and the cost of hauling from the ore bins on the surface at the said shafts to the works of the party of the first part, nine (9) cents per pound copper contained in all ores running over eight (8) per cent. wet assay, less six dollars ($6.00) treatment and seven and one-half (7½) cents per pound copper contained in all ores assaying over three (3) per cent. wet assay, and less than eight (8) per cent.; nothing to be paid for silver.

And the party of the second part hereby agrees that it will pay to the party of the first part twenty (20) per cent. of the net proceeds from the operations in the said mine, and that it will, under the direction of the agents of the party of the first part, maintain all of the workings in and under the said Pennsylvania Lode claim in first-class operating condition, and that it will do such development as to the agents of the party of the first part shall seem proper and as they may request it to do, paying for the same out of the proceeds of the ore thus extracted.

In witness whereof, the parties hereto have caused their re-
64 spective presidents and secretaries to execute this agreement on the day and year first above written.

MONTANA ORE PURCHASING COMPANY,
By F. AUGUSTUS HEINZE, *President.* [SEAL.]
ARTHUR P. HEINZE, *Secretary.* [SEAL.]

(Endorsed:) Title of court and cause. Separate answer of Chile Gold Mining Company. Filed April 29, 1898. Geo. W. Sproule, clerk.

65 And thereafter to wit on the 21st day of March 1899 the mandate of the circuit court of appeal- was filed herein which is in the words and figures as follows, to wit:

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Montana, southern division, Greeting:

[SEAL.] Whereas lately in the circuit — of the United States for the district of Montana, southern division, before you or some of you, in a cause between Boston and Montana Consolidated Copper and Silver Mining Company, complainant, and Chile Gold Mining Company, (a corporation), John MacGinniss, Edward L. Whitmore, Carlos Warfield, and Stephen S. Raymond, defendants, an order and temporary or interlocutory injunction was entered and granted the defendants above named on the 9th day of May, 1898, which said order and temporary or interlocutory injunction are of record in the office of the clerk of said circuit court in said cause in said circuit court, to which record reference is hereby made and the same are hereby expressly made a part hereof; and as by the inspection of the transcript of the record of the said circuit court which was brought into the United States circuit court of appeals for the ninth circuit, by virtue of an appeal agreeably to the act of Congress in such cases made and provided, fully and at large appears

And whereas, in the present term of October in the year of our Lord one thousand eight hundred and ninety-eight the said cause came on to be heard before the said circuit court of appeals on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby reversed with costs, and the cause is remanded to said circuit court with instructions to dismiss the bill, for want of jurisdiction.

FEB. 13, 1899.

66 You therefore are hereby commanded that such dismissal and further proceedings be had in said cause, in accordance with the opinion and decree of this court and as according to right and justice, and the laws of the United States, ought to be had, the said decree of said circuit court notwithstanding.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the 6th day of March in the year of our Lord one thousand eight hundred and ninety-nine.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Costs of Appellants.

Printing record	$235.60
Clerk C. C. trans.	75.00
Clerk C. C. A.	25.45
Attorney	20.00
Taxed at	$356.05

F. D. MONCKTON, *Clerk.*

Clerk, by Chas. W. Blair, dep. clerk.

Mandate—Filed and entered March 21, 1899. Geo. W. Sproule clerk by Chas. W. Blair, dep. clerk.

And thereafter to wit, on the 29th day of March 1899 a decree was duly made and entered herein which is in the words and figures as follows, to wit:

67 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

BOSTON AND MONTANA CONSOLIDATED COPPER and Silver Mining Company, a Corporation, Complainant,
vs.
CHILE GOLD MINING COMPANY (a Corporation); John MacGinniss, Edward L. Whitmore, Carlos Warfield, and Stephen S. Raymond, Defendants.
} Decree. No. 66.

This cause coming on to be heard before the court on the — day of March, 1899, upon the mandate of the United States circuit court of appeals, ninth circuit, filed herein and spread upon the minutes of this court,

It is now hereby on motion of Stapleton and Stapleton solicitors and of counsel for defendants, ordered, adjudged and decreed and in accordance with the direction of the said mandate that the bill herein be dismissed, at the cost of the complainant, and that the defendants have and recover from the complainant their costs on appeal, taxed in said mandate at the sum of three hundred and fifty-six and $\frac{05}{100}$ ($356.05) dollars.

By the court, this 29th day of March, 1899.

HIRAM KNOWLES, *Judge.*

Decree. Filed and entered March 29, 1899, Geo. W. Sproule, clerk by Chas. W. Blair, dep. clerk.

And thereafter to wit on 30th day of March 1899 a bill of exceptions was duly settled allowed and filed herein which is in the words and figures as follows, to wit:

68 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER Mining Company, a Corporation, Complainant,
vs.
CHILE GOLD MINING COMPANY, a Corporation; JOHN MACGinniss, Edward L. Whitmore, Carlos Warfield, and Stephen S. Raymond, Defendants. } No. 66.

This cause came on for hearing upon the application of the defendants, Chile Gold Mining Company, John MacGinniss, Edward L. Whitmore, Carlos Warfield and Stephen S. Raymond, to dismiss this action upon the ground that there was no Federal question presented by the allegations in complainant's amended bill of complaint, herein, and the defendants' answer thereto, and the said application having been submitted to and duly considered by the court, the court rendered its decision herein sustaining said application to dismiss, upon the ground and for the reason that the court has no jurisdiction of said action.

To the ruling of the court in sustaining said application to dismiss and entering a decree of dismissal therein, the complainant in said action duly excepted and asks the court to sign and seal this its bill of exceptions, which was done accordingly in open court this 29th day of March 1899.

HIRAM KNOWLES, *Judge.*

Bill of exceptions. Filed March 30, 1899, Geo. W. Sproule, clerk, by Chas. W. Blair, dep. clerk.

69 And thereafter to wit, on the 30th day of March 1899, a certificate of question of jurisdiction on appeal was duly made, filed and entered herein which is in the words and figures as follows, to wit:

70 In the Circuit Court of the United States, Ninth Circuit, District of Montana, Southern Division.

BOSTON AND MONTANA CONSOLIDATED COPPER and Silver Mining Company, a Corporation, Complainant,
vs.
CHILE GOLD MINING COMPANY, a Corporation; John MacGinniss, Edward L. Whitmore, Carlos Warfield, and Stephen S. Raymond, Defendants. } In Equity. No. 66.

Certificate of question of jurisdiction on appeal from the circuit court of the United States, ninth circuit, district of Montana, southern division, to the Supreme Court of the United States.

This cause coming on for hearing upon the application of the defendants, Chile Gold Mining Company, John MacGinniss, Edward

L. Whitmore, Carlos Warfield, and Stephen S. Raymond, to dismiss said action on the ground of want of jurisdiction in this court to consider the same and said application having been submitted to this court and fully considered, said application to dismiss was sustained and a decree dismissing the same duly entered by this court for the reason and upon the ground that the court has no jurisdiction of said action upon the facts alleged in complainant's bill of complaint and the answer of the Chile Gold Mining Company thereto, and said complainant being desirous of taking an appeal from the decree of the court sustaining said application to dismiss, and entering said decree of dismissal, and having this day applied to this court for a certificate as required by law in such cases:

The court hereby certifies to the Supreme Court of the United States for a decision upon the following question of jurisdiction, which has arisen upon said application to dismiss, whether or not said court had jurisdiction and whether or not a Federal
71 question is presented in complainant's bill of complaint and the answer of the Chile Gold Mining Company thereto.

The said allegations in said complainant's bill of complaint are as follows, to wit:

"That your orator is now and at all the times hereinafter mentioned was a corporation organized and existing under and by virtue of the laws of the State of Montana, with its principal place of business at Butte city, Silver Bow county, State of Montana.

That the defendant, Chile Gold Mining Company is now and at all the times hereinafter mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of Montana, with its principal place of business at Butte city, Silver Bow county, State of Montana.

That your orator is the owner and entitled to the possession of that portion of the following-described property known as and called the Pennsylvania Lode mining claim, lot number one hundred and seventy-two, situated in Summit Valley mining district Silver Bow county, Montana, which is particularly bounded and described as follows to wit:

Beginning at corner number one from which the quarter-section corner on the north boundary of section eighteen in township three north range seven west of the principal meridian for Montana bears north three degrees fifty-seven minutes west seven hundred and thirteen feet distant and corner number three of lot number sixty-four, the St. Lawrence claim, and corner number two of lot number one hundred twenty-six, the Little Ida claim bears north eighty-three degrees ten minutes east four hundred forty-nine feet distant. Thence first course, magnetic variation nineteen degrees forty-five minutes east south eighty-eight degrees fifteen minutes east fifty-six feet, to a point on the east end line of lot one hundred forty-seven, the Rob Ray Lode claim for point of intersec-
72 tion of said lots 147 and 172, from which corner number five of said lot 147 bears south eleven degrees east two hundred and ninety-six feet distant; one thousand five hundred feet to corner number two. Thence second course, magnetic variation twenty de-

grees east, south 4 degrees 30 minutes west 564.6 feet to a point on the north boundary line of mineral application 722, a placer claim from the northwest corner of said mineral application 722, which is also the northeast corner of mineral application 686, a placer claim, bears west 183.9 feet distant, six hundred feet to corner number three. Thence third course, magnetic variation 20 degrees east, north 88 degrees 15 minutes west 181.3 ft. to a point on the west boundary line of said mineral application 722, and east boundary line of said mineral application 686, from which the northwest corner of said mineral application 722 and the northeast corner of said mineral application 686 bears north 29.8 feet distant, nine hundred and twenty-four feet, to a point over a tunnel, from which the mouth of said tunnel bears south 58 feet distant, eleven hundred and fifty-six and two-tenths feet to a point on the north boundary line of said mineral application 686, from which the northeast corner of said mineral application 686 bears east 974.4 feet distant, fifteen hundred feet to corner number four, from which the southwest location corner bears south four degrees 30 minutes west 48 feet distant; discovery shaft bears north 70 degrees 30 minutes east 827 feet distant; corner number five of lot 147 bears north 27 degrees 30 minutes east 344 feet distant and corner number three of lot 148, the Grant Extension lode bears south 36 degrees 45 minutes west 152 feet distant. Thence fourth course, magnetic variation, 20 degrees east north four degrees east 325 feet to a point on south side line of said lot 147 for point of intersection of said lots 147 and 172, from which corner number five of said lot 147 bears south 82 degrees 4 minutes east 135 feet distant; six hundred feet to corner number one, the place of beginning. Expressly excepting and ex-
73 cluding herefrom all that portion of the ground heretofore described embraced in said mining claim or lot number 147; also mineral application- 686 and 722; and also that portion of the said Pennsylvania vein or lode and also all veins, lodes or ledges throughout their entire depth, the tops or apices of which lie inside of such excluded ground. Also excepting and excluding therefrom all that portion of the said above-described Pennsylvania Lode claim, described as follows, to wit: Beginning at the northeast corner of lot number 172, and running thence north 88 degrees 15 minutes, west 130 feet; thence south 69 degrees 25 minutes east 136 feet; thence north 4 degrees 30 minutes east 44 feet to the place of beginning, and containing an area of $\frac{7}{100}$ of an acre of ground.

That this complainant became and was and is the owner of the said premises in the following manner to wit:

That on the 18th day of June 1877 William Harris Sr. and William Harris Jr. duly located the said Pennsylvania Lode claim as a quartz lode mining claim.

That on the 13th day of January, 1879, the said William Harris Sr. and William Harris Jr. duly conveyed to John E. Lloyd, David E. Lloyd, and Thomas E. Lloyd, by regular deed of conveyance a one-half undivided interest in and to the said Pennsylvania Lode claim.

That on January 13th, 1879, he, said William Harris Sr. and

William Harris Jr. duly conveyed to John H. Davis, by regular deed of conveyance an undivided one-sixth interest in and to the said Pennsylvania Lode claim.

That on the 19th day of May, 1879, the said John H. Davis duly conveyed to William Harris Sr. by regular deed of conveyance a one-twelfth undivided interest in and to the said Pennsylvania Lode claim.

That on the 19th day of May, 1879, the said John H. Davis duly conveyed to John Dunstan by regular deed of conveyance a one-twelfth undivided interest in and to the said Pennsylvania Lode claim.

74 That on March 13th, 1880, David J. Lloyd conveyed to William W. Thomas, by regular deed of conveyance an undivided one-twelfth interest in and to the said Pennsylvania Lode claim.

That on the 14th day of August, 1880, William Harris, Sr., and William Harris, Jr., conveyed to Thomas Griffith, by regular deed of conveyance, an undivided one-twelfth interest in and to the said Pennsylvania Lode claim.

That on July 16th, 1882, Thomas C. Porter and Howell M. Thomas, the duly appointed, qualified and acting administrators of the estate of William H. Thomas, deceased, duly authorized and empowered, conveyed by regular deed of conveyance to John E. Lloyd an undivided one-twelfth — in and to the said Pennsylvania Lode claim.

That on the 19th day of July, 1882, the said John E. Lloyd, by regular deed of conveyance, conveyed to Jeremiah Griffith an undivided one-twelfth interest in and to the said Pennsylvania Lode claim.

That on the 15th day of August, 1883, the said William E. Harris, Jr., and Anna Harris, his wife, by regular deed conveyance, conveyed to Thomas Griffith an undivided one-eighth interest in and to the said Pennsylvania Lode claim.

That on the 19th day of April, 1886, a United States patent for the said Pennsylvania Lode claim, was duly issued by the United States to William Harris, Sr., William Harris, Jr., John E. Lloyd, David J. Lloyd, Thomas E. Lloyd, Jeremiah Griffith, and John Dunstan.

That on the 26th day of March, 1888, the said Jeremiah Griffith, by regular deed of conveyance, conveyed to Enoch Grim an undivided one-twelfth interest in and to the said Pennsylvania Lode claim.

That on the 31st day of March, 1888, the said John E. Lloyd, Margaret Lloyd, his wife, Jeremiah Griffith, Enoch Grim, John H. Davis and Laura Davis, his wife, William Harris, Jr., and

75 Anna Harris, his wife, Thomas Griffith and David J. Lloyd, by John E. Lloyd, his attorney-in-fact, by regular deed of conveyance, conveyed to Thomas Couch, all that portion of the said Pennsylvania Lode claim hereinbefore described as the property of the complainant, excepting a right of way to the Montana railway.

That on the 30th day of November, 1888, by regular deed of con-

veyance, the said Thomas Couch and Rachel Couch, his wife, conveyed to this complainant, The Boston and Montana Consolidated Copper and Silver Mining Company, all that portion of the said Pennsylvania Lode claim, hereinbefore described as the property of this complainant, and that thereby and by virtue of the said conveyances the complainant became and was and is the owner of the said premises hereinbefore described.

That on or about the 28th day of March, 1898, the said defendants wrongfully and unlawfully entered into the said premises hereinbefore described, by underground workings and by tunnels, shafts, cross-cuts, and levels, and extracted from the said premises large quantities of valuable ores, to wit, ten thousand (10,000) tons, more or less, and of the reasonable value of seventy-five thousand (75,000) dollars.

And that ever since the said date the said defendants have continued to extract and mine ores from the said premises belonging to this complainant, and are now mining and extracting ores therefrom and threaten to continue to do so unless this court shall, by its injunction, restrain and enjoin the said defendants from so doing.

That the said ground of this complainant is valuable almost exclusively for the minerals therein contained, and that the same is very valuable for the copper, and silver and gold ores which are found therein in large quantities, and that it is these ores that the defendants have extracted and which they are now extracting and mining and threaten to continue to extract in the future.

That the said ground owned by the complainant herein
76 before described is of the reasonable value of more than one hundred thousand dollars, and that the said ores which the defendants are extracting and threaten to extract are of the value in excess of fifty thousand dollars.

The complainant further alleges that it has no means of ascertaining the quantity or value of the ores which the said defendants are extracting or may extract from the said premises owned by the complainant, and that if the said defendants are permitted and allowed to continue to extract the said ores from the said premises that it would be altogether uncertain and indefinite as to what amount of ores ore the value thereof, which may be extracted in the future as in the past, and that the complainant will be compelled to rely to a great extent upon the good faith and showing of the defendants as to the amount or value of the ores which they have heretofore and may hereafter extract from the said premises.

That unless the defendants are enjoined and restrained from mining and extracting the ores from the said premises of this complainant, the said portion of the said Pennsylvania Lode claim, this complainant will be required to bring numerous actions for the determination of the damages which it has sustained and will sustain by reason of such trespasses, and that the said trespasses on the part of the said defendants are continuing from time to time and that this complainant brings this action in order to avoid a multiplicity of actions in the premises.

That by reason of the said trespasses on the part of the said de-

fendants on the premises of this complainant, this complainant has suffered and will continue to suffer great and irreparable injury and damage.

That on or about the 15th day of April, 1898, this complainant brought an action in the circuit court of the United States, ninth circuit, for the district of Montana, southern division, against the said defendants to recover of the said defendants for the ores extracted from the said portion of the Pennsylvania claim, hereinbefore described, and that the said action is now pending in this court.

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And, as showing the jurisdiction of this court to determine the said matters set forth in the said action this complainant alleges:

That the determination of the said controversy between the said complainant and the said defendants involves the construction of title twenty-three, chapter VI of the Revised Statutes of the United States, concerning mines and mineral lands, in this, to wit:

That the said Pennsylvania Lode claim, owned and claimed by the complainant, as hereinbefore alleged, is a mining claim duly located under the provisions of the statutes of the United States, relative to the appropriation of mineral lands and that the same has been patented as a mining claim under the provisions of the said statutes.

That the said defendants are or claim to be the lessees of or to have some interest in a portion of that certain quartz lode mining claim known as and called the Johnstown Lode claim, lot number 173, and also a portion of the Little Ida Lode claim, lot number 126, which said claims lie north of and partially adjoining and near to the said Pennsylvania Lode claim on the north; that plaintiff is not acquainted with the exact metes and bounds of said ground claimed by the defendants.

That the said Rarus Lode claims, Johnstown Lode claim, and the Little Ida Lode claim are mineral claims located under the laws of the United States, relative to the appropriation and location of mineral lands, and complainant is informed and believes and therefore alleges, that the said claims or some of them have been patented by the United States to various parties, and that such patents were issued under and by virtue of the statutes of the United States, relative to the patenting of mineral lands upon the public domain.

That as complainant is informed and believes and therefore alleges, the said defendants claim the right to enter upon the premises of this complainant, to wit, that portion of the Pennsylvania Lode claim above described, by reason of the fact that certain veins, leased or claimed by the defendants or in their possession, have their tops or apexes within the ground owned or claimed as a part of the Rarus Lode claim, or a portion of the Johnstown Lode claim, or a portion of the Little Ida Lode claim, and that defendants assert the right to follow such veins on their downward courses or dips although the same so far depart from a perpendicular as to depart from the ground leased or claimed by the defendants, and enter the premises owned or claimed by this

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complainant, to wit that portion of the Pennsylvania Lode claim hereinbefore described.

But complainant denies and disputes the fact that the said veins upon which the said defendants have mined within the lines of the Pennsylvania Lode claim, even if such veins have their apices in the said Rarus Lode claim, or Johnstown Lode claim, or said Little Ida Lode claim, which complainant does not admit, are such veins as can be followed on their dip beyond the lines of the said lode claim and into the ground or premises of this complainant; but alleges the facts to be that the said veins are broken and intersected by faults in such a manner that the same cannot be traced or followed from the said Rarus or Johnstown or Little Ida Lode claims, into the Pennsylvania Lode claim, and that therefore the said defendants have no right to enter upon the ground of this complainant, to wit, the said Pennsylvania Lode claim, for the purpose of extracting ores therefrom by reason of their claim upon or interest in the apices of any veins, within the Rarus or Johnstown or Little Ida Lode claims.

And this complainant further shows that the veins upon which the defendants have been extracting ore within the premises of this complainant, if they or any of them have their apices on the said Rarus or Johnstown or Little Ida Lode claims, which complainant does not admit, do not on their course or strike depart from
79 the end lines of the defendants' claims or possessions, but that the same depart from the side lines of such claims in such manner as to prohibit the said defendants from following the same beyond the said lines of said lode claims into complainant's portion of the said Pennsylvania Lode claim.

That there are several veins which the defendants claim the right to follow on their dip beyond the side lines into the ground of this complainant, the said Pennsylvania Lode claim, but that neither of the said veins in their course or strike depart from the end lines of the said Rarus or Johnstown or Little Ida Lode claims if they have their apices within said lode claim- at all; but complainant alleges that the ground in which the defendants claim some interest as aforesaid, was not so located or situated as to have any end lines whatever, as provided by the statutes of the United States, in such cases, and in consequence of such failure upon the part of the locator or locators of the ground or claims leased or owned by the defendants, to mark the same with end lines parallel, or to locate the same along the veins, but on the contrary having located the same across the veins, the defendants and their lessors or grantors have no extralateral rights in or to any of the veins in their said ground and are not entitled to follow the same into or upon the ground of this complainant, the said portion of the said Pennsylvania Lode claim.

And complainants further show- that a patent was issued by the United States of America to Stanislaus E. Hirbour and others to that certain quartz lode mining claim known as and called the Rarus Lode claim hereinbefore referred to, a copy of which patent is

hereto attached, marked Exhibit "A" and made a part of this complaint.

And complainant further shows that a patent has been granted by the United States of America to William Harris, Sr., and others to that certain quartz lode claim known as and called the Johnstown Lode claim, a copy of which patent is hereto attached,
80 marked Exhibit "B" and made a part of this bill.

And as showing that the questions involved in this controversy are questions arising under the statutes of the United States and involving the construction thereof, complainant shows and alleges that the said defendants herein claim to be the lessees or to have some interest in a portion of the ground patented under the said Johnstown and Rarus patents and that by virtue of the said Rarus patent, that they, the said lessors and grantors have acquired thirteen hundred and eighteen linear feet of what is designated and called the Rarus lode and it is contended by the said defendants that under and by virtue of the said Rarus patent that they and their said lessors and predecessors in interest were granted thirteen hundred and eighteen linear feet of the Rarus lode, extending from what is known as the east end line of the Rarus claim to an imaginary or projected line of the Rarus location.

And complainant further shows that the surface ground patented to the lessors or predecessors in interest of defendants to the Rarus Lode claim does not include to exceed three hundred linear feet of the said Rarus lode as shown in yellow shading on the map attached to the Rarus patent, but notwithstanding the fact that the surface ground granted by the said Rarus patent did not cover or extend over the said Rarus lode the defendants contend and claim that the said patent of the Rarus claim granted to them and their lessors and predecessors in interest the said Rarus Lode claim, beyond the surface ground granted by the Rarus patent, and to the full extent thereof of thirteen hundred and eighteen linear feet; and also contend and claim that by reason of the ownership of the said lode for the length aforesaid, and that by reason of the fact that the same passes through the east end line of the Rarus — as patented and the west end line of the original location of the said claim, that they are entitled to follow said veins on their courses or
81 dips into the earth and without the lines of the Rarus claim, both as originally located and as patented.

Your complainant further shows that a large quantity of the ground which it is claimed by the defendants was originally included within the location of the Rarus claim, has been patented under the said Johnstown patent, hereinbefore referred to and as shown by the portion shaded in yellow on the plat attached to the Johnstown patent. That notwithstanding that a portion of the Rarus location was patented under the Johnstown claim, the defendants contend and claim that only the surface ground of the Johnstown claim was patented to the patentees therein named, and that all veins lying within the original location lines of the Rarus claim were patented to the claimants under the Rarus claim, and that the defendants and their lessors or grantors are entitled to claim the said veins extending

through the Johnstown patent under and by virtue of the Rarus patent and that its extralateral rights should be determined by the Rarus and not by the Johnstown patent.

Complainant further shows that it disputes each and every one of the claims made by the defendants relative to the construction of the said several patents, and claims that all veins whose apexes lie within the Johnstown patent must be governed and regulated in extralateral rights, if any they have, under the Johnstown patent and not under and by virtue of the Rarus patent.

And complainant further shows that the defendants claim that if they have no right to follow the veins within the lines of the original Rarus location, by virtue of the said Rarus patent, that they have a right to follow the same under and by virtue of the Johnstown patent, or the Johnstown and Rarus patents combined, under and beneath that portion of the Pennsylvania Lode claim, belonging to this complainant; but opposed to this contention the complainant contends and insists that the defendants have no right to follow any vein having its apex within either the Johnstown or Rarus patents under any circumstances into or under the Pennsylvania Lode claim at any point of the east of the intersection
82 of the south side line of the Johnstown patent with the south side line of the original Rarus location.

And complainant further shows that the said defendants contend that the complainant cannot under any circumstances obtain any relief for ores extracted within that portion of the premises owned by it, without first showing that the apices of the veins from which the ores were extracted, are within the surface lines of the ground owned and claimed by the complainant, whereas complainant contends that *prima facie* it is the owner of all ores found within its boundaries extended downward into the earth, until it has been shown that some other person or company has some right thereto, by reason of the ownership of the apex of the vein within some other claim.

The complainant further shows that it is claimed by the defendants that the apex of the veins from which the ores in question were extracted is divided in that a portion thereof is claimed by the defendants as a part of the Rarus Lode claim and a portion thereof upon the Johnstown Lode claim and a portion thereof upon the Pennsylvania Lode claim.

And defendants claim that by reason of the said divided apex that they may claim the right to follow the said vein beneath the surface and without the side lines of the Rarus and the Johnstown Lode claims, under and by virtue of either or both of the said claims at their election.

Complainant alleges that if any such vein exists as is claimed by the defendants that they have no extralateral rights by reason of the fact that the same has a divided apex.

Wherefore your complainant prays that the said defendants, Chile Gold Mining Company, John MacGinniss, Edward L. Whitmore, Carlos Warfield, and Stephen S. Raymond, their servants, agents, attorneys, clerks, workmen and employees be by this court forever en-

joined and restrained from mining or extracting any ores from within the limits of that portion of the said Pennsylvania
83 Lode claim, hereinafter described, and from removing therefrom any ores which have heretofore been extracted therefrom, and that until the hearing of this application of this complainant for an injunction, and pending the determination of the title to the said premises, that the said defendants, their agents, servants, attorneys, clerks, workmen and employees be restrained and enjoined from mining or extracted ores from within the said portion of the said Pennsylvania Lode claim, hereinbefore described, and from removing any ores which they may have extracted therefrom, or may hereafter extract therefrom.

Your complainant further prays this honorable court to grant unto your complainant not only a writ of injunction conformable to the prayer of this bill but also a writ of subpœna of the United States of America, issuing out of and under the seal of this court, to be directed to the said Chile Gold Mining Company, John MacGinniss, Edward L. Whitmore, Carlos Warfield and Stephen S. Raymond, defendants, commanding them by a day certain to appear before your honors in the court aforesaid, and answer unto this bill of complaint and abide the order and decree of this court, and for such other and further relief as may be meet and equitable in the premises."

That said allegations in said answer of the Chile Gold Mining Company to said bill of complaint are as follows, to wit:

"That it admits that the complainant is a corporation organized and existing under and by virtue of the laws of the State of Montana, with its principal place of business at Butte city, Silver Bow county, Montana.

That this complainant is now and at all time- mentioned in said complainant was a corporation duly organized and existing under and by virtue of the laws of the State of Montana, having its principal place of business at Butte city, Silver Bow county, State of Montana.

Admits that the defendants, Edward L. Whitmore, and
84 Carlos Warfield, are officers of this defendant, The Chile Gold Mining Company, and in charge of its operations and affairs, but denies that said Stephen S. Raymond is or was at the commencement of this suit, an officer of this defendant, or in charge of its affairs.

Admits that the complainant is the owner of the surface ground of that portion of the Pennsylvania Lode claim described in its complaint but denies that the complainant is the owner of or entitled to the lode or vein or any ore bodies, upon which the defendant has entered and from which it has extracted the ores in question in this case, and alleges that the Montana Ore Purchasing Company is a corporation duly organized and existing under and by virtue of the laws of the State of Montana, having its principal place of business at Butte city, in said State, and is the owner of said veins or lodes and ore bodies.

Admits that complainant acquired title to the surface of the Penn-

sylvania Lode claim, by virtue of the several deeds of conveyance set out in its bill of complaint.

Denies that on or about the first day of April, 1895, or at any other time or at all this defendant, Chile Gold Mining Company, wrongfully or unlawfully entered upon or into the premises of the complainant, to wit: the said Pennsylvania Lode claim, described in said complaint by underground workings or tunnels or shafts or cross-cuts, or levels or otherwise or at all, or extracted therefrom large or any quantities of valuable or other ores containing copper, silver or other precious metals, against the will, wish and consent of plaintiff.

Denies that by means of these underground workings or otherwise or at all this defendant has extracted from within the limits of this plaintiff's premises, the Pennsylvania Lode claim, ten (10) thousand tons, or any number of tons of ore more or less of the reasonable value of seventy-five thousand dollars ($75,000) or of any value whatever, or has converted the same to its own use.

Denies that this defendant ever at any time or at all ex-
85 tracted from said Pennsylvania Lode claim any quartz, or ore, or mineral-bearing rock of any kind or description belonging to plaintiff.

Denies that ever since that time or at all defendant has continued to mine and extract ores from said premises belonging to the complainant, or is now extracting ore therefrom, or threaten- so to do, or that it ever or at all mined or extracted ores from said premises belonging to the complainant or threatened to do so, as alleged in plaintiff's complaint, or otherwise, or at all, and denies that it will do so unless restrained by the injunction of this court.

Denies that by reason of said trespass plaintiff has been damaged in the sum of seventy-five thousand dollars ($75,000) or in any sum or amount whatever, or damaged at all, or that this said defendant has not paid the sum or any part thereof.

Denies that the determination of said controversy between the said plaintiff and this defendant, The Chile Gold Mining Company involves the construction of title 23, chapter 6, of the Revised Statutes of the United States concerning mines and mineral lands, or the construction of any other statute or law of the United States.

Admits that the said Pennsylvania Lode claim claimed by plaintiff is a mining claim duly located under the provisions of the statutes of the United States relative to the appropriation of mineral lands, and that the same has been patented as a mining claim under the provisions of the said statute.

Denies that this defendant, The Chile Gold Mining Company, claims to be the lessee of or to have some interest in a portion of that certain lode claim known as and called the Rarus Lode claim, lot number 179, or claimed to have any interest or right to any portion of the Little Ida Lode claim, lot number 126, which said claims lie north of and partly adjoining and near the said Pennsylvania Lode claim on the north.

This defendant admits that it claims to be the lessee and
86 to have an interest in a portion of that certain quartz lode mining claim known as and called the Johnstown Lode

claim, lot No. 173, lying north of and partly adjoining said Pennsylvania Lode claim.

This defendant admits that the said Rarus Lode claim, Johnstown Lode claim and the Little Ida Lode claim are mineral claims located under the laws of the United States, relative to the appropriation and location of mineral lands and that they have been patented by the United States to various parties and that such patents were issued under and by virtue of the statutes of the United States, relative to the patenting of mineral lands upon the public domain.

This defendant d-nies that it claimed the right and entered upon the premises of the plaintiff, to wit: that portion of the Pennsylvania Lode claim described in plaintiff's complaint, by reason of the fact that certain veins leased or claimed by this defendant, or in its possession, have their tops or apices within the ground owned or claimed as a part of said Rarus Lode claim, or a portion of the said Little Ida Lode claim.

Denies that this defendant claims any right whatever under or by virtue of any vein apexing in said Rarus or Ida Lode claims, or claims any right, title, or interest in or to any veins belonging to or the top or apex of which lies within the Rarus or Little Ida Lode claims, but this defendant admits that it claims the right to enter upon the premises claimed by plaintiff, to wit: that portion of the Pennsylvania Lode claim described in complainant's complain*ant*, by reason of the fact that certain veins leased and claimed by this defendant and in its possession have their top or apices within the ground owned and claimed as a part and portion of said Johnstown Lode claim, although the same so far departs from a perpendicular as to depart from the ground enclosed within the exterior line of said Johnstown Lode claim, and enter the premises owned or claimed by the plaintiff, to wit: that portion of the Pennsylvania Lode claim described in plaintiff's complaint.

87 This defendant alleges that the veins or lodes upon which it has been mining within the Pennsylvania Lode claim and underneath the surface thereof, have their top or apex within the lines of the Johnstown Lode claim, as located and patented for the entire length of said claim and running nearly parallel with the side lines thereof and that the same passes on their strike through the end lines of said Johnstown Lode claim, and through both end lines thereof, and runs the full length of said claim as located and patented, and that said lines are parallel, and this defendant further alleges that the veins or lodes upon which it has mined within the Pennsylvania Lode claim have their top or apex within that portion of the Johnstown Lode claim, owned by the Montana Ore Purchasing Company, and leased by it to this defendant, and that the said veins can be followed and have been followed continuously on ore on the dip or downward course from the top or apex thereof within the boundary lines of said Johnstown Lode claim, and within the boundary lines of that portion thereof leased by this defendant into the ground owned or claimed by complainant, to wit, the Pennsylvania Lode claim, and this defendant denies that the veins or ores from which it has been extracting ores within the premises of com-

plainant, to wit, the Pennsylvania Lode claim, are broken and intersected by faults, or otherwise in such a manner that the same cannot be traced or followed from the said Johnstown into and beneath the said Pennsylvania Lode claim, and denies that by reason thereof this defendant have not right to enter upon the ground of plaintiff, to wit, the Pennsylvania Lode claim, for the purpose of extracting ores therefrom by reason of its claim or interest in the apices of any veins within said Johnstown Lode claim.

This defendant denies that the vein or veins upon which it has been extracting ore within the premises of the plaintiff, which have their apices within the Johnstown Lode mining claim, do not in their course or strike depart from the end lines of said Johnstown Lode claim, but depart from the side line of said claim in any
88 manner whatever, or so as to prohibit this defendant from following the same beyond the lines of said Johnstown Lode claim, under plaintiff's portion of said Pennsylvania Lode claim.

Defendants admit- that there are several veins which this defendant claims the right to follow on the dip beyond the side lines of the said Johnstown Lode claim, into the ground of plaintiff, the said Pennsylvania Lode claim, but denies that neither of said veins in their course or strike depart from the end lines of the said Johnstown Lode claim, and denies that said claim was not so located or situated as to have any end lines whatever, as provided by the statutes of the United States, in such case, or that in consequence of such failure upon the part of the locator or locators of said Johnstown Lode claim, leased by this defendant, to mark the same with end lines parallel, or to locate the same along the veins, but on the contrary having located the same across the veins, that the said Montana Ore Purchasing Company, or this defendant as its lessee, has no extralateral rights in or to any of the veins in said Johnstown Lode claim, or are not entitled to follow the same into or upon the ground of plaintiff, to wit, said portion of the said Pennsylvania Lode claim, and this defendant avers the fact to be that said Johnstown Lode claim was so located and patented as to have parallel end lines as provided by the statutes of the United States, and that said claim was located along the vein therein and along the tops or apices of the veins upon which this defendant had been mining in such manner as to entitle this defendant to follow said veins into the earth on their dip although they may so far depart from said Johnstown Lode claim, in their downward course as to pass beyond the side lines thereof and enter beneath the surface of said Pennsylvania Lode claim.

This defendant admits that a patent was issued by the United States of America to Stanislas E. Hirbour and others, to that certain quartz lode mining claim known as and called the Rarus Lode mining claim, and that a copy of said patent is attached to
89 plaintiff's complaint, and marked Exhibit 'A.'

Defendant further admits that a patent has been issued by the United States of America to William Harris, Sr., and others to, that certain quartz lode mining claim known as and called the Johns-

town Lode mining claim, and that a copy of said patent is attached to plaintiff's complaint and marked Exhibit 'B.'

This defendant admits that it claims to be a lessee and to have an interest in a portion of the ground patented under the said Johnstown Lode claim, but denies that it has or claims any right whatever, or interest in any portion or part of the ground patented as the Rarus Lode claim, and denies that this defendant, as such lessee, or otherwise, or at all, has acquired or claimed to acquire, thirteen hundred linear feet of what is designated or called the Rarus Lode claim, or any other number of feet belonging to said Rarus Lode claim.

This defendant does not know and does not claim to know how much surface ground was patented to the Rarus Lode claim, and had no knowledge in regard thereto from which it can form an opinion.

This defendant further represents that as it claims no right title, or interest whatever, as lessee or otherwise, in or to any part or portion of any ground or any lode or veins which have their apices in or belonging to said Rarus Lode claim, that it is immaterial so far as this defendant is concerned, how much ground was really patented and granted in the patent by the Government of the United States to the said Rarus Lode claim.

This defendant admits that a large portion of the ground which was originally included within the location of the Rarus claim, has been patented under the said Johnstown patent and defendant denies that it contends or claims that only the surface ground of the Johnstown claim was patented to the patentee therein or that all or any vein lying within the original location lines of the Rarus claim were granted by the Rarus patent, and denies that it
90 claims, or contends, that it is entitled to claim the veins extending through the Johnstown claim under or by virtue of the Rarus patent, or that its extralateral rights should be determined by the Rarus patent and not by the Johnstown patent, but defendant alleges that it contends and claims that its extralateral rights to the veins in question should be determined by the ownership of the Montana Ore Purchasing Company, and by this defendant's lease from said company of that parcel of ground now included within the Johnstown claim, and leased by the owner thereof to this defendant and not by the Rarus lode or patent, for the reason that said veins or lodes have their tops or apices within the ground belonging to said Johnstown Lode claim, and leased to this defendant by said owner thereof.

This defendant admits that so far as it is concerned extralateral rights to which it is entitled, and its right to follow the veins the apex of which is in the Johnstown Lode claim, to the point where the ore sued for in this case was extracted, should be governed and regulated by the rights conveyed by the United States in the Johnstown patent, and not under or by virtue of the Rarus patent, or any part thereof, or any veins belonging thereto; and defendant denies that it contends it has a right to follow said veins or any of them in their downward course by reason of the Johnstown and Rarus patents

combined, and denies that this defendant has no right to follow any vein having its apex within the Johnstown Lode claim under any circumstances into or under said Pennsylvania Lode claim at any point east of the intersection of the south side line of the Johnstown patent to the side line of the original Rarus location.

This defendant denies that it contends, or claims that the plaintiff cannot, under any circumstances, obtain any relief for ores extracted within that portion of the premises owned by it without first showing that the apices of the veins from which the ores were extracted are within the surface lines of the ground owned and claimed by
91 plaintiff and admits that *prima facie* plaintiff is the owner of all ores within the boundaries of its claim, extended downward vertically into the earth until it has been shown that some other person or persons has some right thereto by reason of the ownership of the apices of the veins within some other claim.

Defendant denies that it is claimed by this defendant that the apex of the veins from which the ores in question were extracted is divided in that a portion thereof is claimed by the Rarus Lode claim, and a portion thereof by the Johnstown Lode claim, and a portion thereof by the Pennsylvania Lode claim, but this defendant avers the fact to be that it only claims a right to such veins as apex within that portion thereof claimed by the Montana Ore Purchasing Company, in the Johnstown Lode claim; and this defendant denies that it claims by reason of a divided apex that it may claim the right to follow the said vein or any vein beneath the surface and without the side lines of the Rarus and Johnstown Lode claims, under and by virtue of either or both of said claims, or patents, and at its election or at all.

Defendant denies that if any such vein exists, that it is claimed by this defendant, that it has any extralateral rights by reason of the fact that the same has a divided apex.

This defendant denies that there is involved in this suit, or the matter in controversy between plaintiff and this defendant, numerous or any Federal questions named in said complaint, or at all, and denies that there is involved the construction of the statutes of the United States, relative to the locating, purchasing or patenting of mineral lands or their construction of such statutes relative to the right of one claimant to follow veins down to and into the premises of another under the circumstances and situations of the parties in this action, or the construction of said statute in relation to the patenting of claims or whether the vein can be patented to one person and the surface to another, or to the right of the Land Depart-
92 ment to segregate the surface of the mineral in the ground, granting one to one person and the other to another, and as to whether said action is authorized under and by virtue of said statutes, and also as to whether, when an apex of a vein is divided on the surface, part being within the premises granted in one patent and a part within another as to what, if any, extralateral rights are granted under said circumstances.

Defendant denies that the construction of any law of the United States or any Federal question whatever is involved in this suit.

This defendant avers that there is no controversy between the complainant and this defendant in this action, about any of the matters or things suggested or stated by the complainant for the purpose of showing that this court has no jurisdiction. This defendant therefore asserts that this court has no jurisdiction of the subject-matter of this action, or the controversies between the complainant and defendant herein."

The court further certifies that upon the said bill of complaint, and the said answer thereto, this court sustained said application to dismiss and entered a decree of dismissal in accordance therewith, holding that a Federal question was not presented by said allegations and that in consequence thereof there was no jurisdiction in this court in said action. The court further certifies that the amount involved in said controversy as shown by said bill of complaint was in excess of two thousand dollars, exclusive of interest and costs.

Done this 30 day of March, 1899.

HIRAM KNOWLES,
Judge of said Court.

Endorsed: Title of court and cause. Filed & entered, March 30, 1899. Geo. W. Sproule, clerk. By Chas. W. Blair, deputy clerk.

93 And thereafter to wit, on the 16th day of March 1901 an assignment of errors was filed herein in the words and figures as follows, to wit:

94 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER Mining Company, Complainant,
vs.
CHILE GOLD MINING COMPANY, a Corporation; JOHN MacGinness, Edward L. Whitmore, Carlos Warfield, and Stephen S. Raymond, Defendants. } No. 66.

Assignment of Errors.

Comes now the complainant in the above-entitled cause and assigns errors in the decision and decree of the circuit court in the above-entitled cause, as follows:

I.

In dismissing the said action and entering the final decree in favor of the defendants for its costs against the complainant the court erred.

II.

The court erred in holding that it had no jurisdiction of the subject-matter and parties in the above-entitled action and in dismissing the complainant's bill upon motion of the defendants.

In order that the foregoing assignment of errors may be and appear of record, the complainant presents the same to the court and prays that such disposition be made thereof as in accordance with the law and statutes of the United States in such cases made and provided, and complainant prays a reversal of the decretal order and decree of dismissal made and entered by said court.

JOHN F. FORBIS AND
L. O. EVANS,
Of Butte, Montana, Solicitors for Complainant.

Service of the foregoing by copy is hereby acknowledged
95 this 15th day of March, 1901.

McHATTON AND COTTER,
Solicitors and of Counsel for Defendant.

Endorsed: (Title of court and cause.) Assignment of errors. Filed and entered March 16th, 1901. Geo. W. Sproule, clerk.

And thereafter, to wit, on the 16th day of March, 1901, a petition for allowance of appeal was filed herein which is in the words and figures as follows, to wit:

96 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER Mining Company, Complainant, *vs.* CHILE GOLD MINING COMPANY, a Corporation; JOHN MACGinniss, Edward L. Whitmore, Carlos Warfield, and Stephen S. Raymond, Defendants.	No. 66.

Petition on Appeal.

To the Honorable Hiram Knowles, district judge and one of the judges of the above-named court, presiding therein:

The above-named complainant, in the above-entitled cause, Boston and Montana Consolidated Copper and Silver Mining Company, conceiving itself aggrieved by the order and decree made and entered by the above-named court in the above-entitled cause, under date of March 29, 1899, wherein and whereby among other things, it was and is ordered and decreed that this action be dismissed for the reason that the court has no jurisdiction of the subject-matter or parties to this action and that the defendants have and recover of the complainant *its* other costs of suit, and do hereby appeal to the Supreme Court of the United States from said decree; and plaintiff prays that this its petition for its said appeal may be allowed and that the transcript of record, proceedings and papers upon which

said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated this 15th day of March 1901.

JOHN F. FORBIS &
L. O. EVANS.
Of Butte, Montana, Solicitors for Boston and Montana Consolidated Copper and Silver Mining Company, Complainant.

97 Service of the foregoing by copy is hereby acknowledged this 15th day of March, 1901.

McHATTON AND COTTER,
Solicitors and of Counsel for Defendants.

Endorsed: (Title of court and cause.) Petition on appeal. Filed and entered March 16, 1901, Geo. W. Sproule, clerk.

And thereafter, to wit, on the 16th day of March 1901 an order allowing an appeal herein was duly made, entered and filed herein in words and figures as follows, to wit:

98 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER Mining Company, Complainant,
vs.
CHILE GOLD MINING COMPANY, a Corporation; JOHN MACGinness, Edward L. Whitmore, Carlos Warfield, and Stephen S. Raymond, Defendants. } No. 66.

Order Allowing Appeal.

At a stated term, to wit, the February term, A. D. 1901, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the district of Montana, held at the court-room in the city of Butte, county of Silver Bow, on the 16th day of March, 1901.

Present: Honorable Hiram Knowles, United States district judge.

On motion of Forbis and Evans, solicitors and of counsel for the complainant, it is ordered that an appeal to the Supreme Court of the United States from the final decree heretofore filed and entered herein, be and the same is hereby allowed, and that the certified transcript of the record, testimony, exhibits, stipulations and all proceedings herein, be forthwith transmitted to the Supreme Court of the United States. It is further ordered that the bond on appeal be fixed at the sum of five hundred dollars, as a bond for costs and damages on appeal.

Dated the 16th day of March, 1901.

HIRAM KNOWLES,
District Judge.

Endorsed: (Title of court and cause.) Order allowing appeal. Filed and entered March 16, 1901. Geo. W. Sproule, clerk.

99 And thereafter, to wit, on the 16th day of March 1901, a bond on appeal was duly approved and filed herein which is in the words and figures as follows, to wit:

100 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER Mining Company, Complainant,
vs
CHILE GOLD MINING COMPANY, a Corporation; JOHN MACGINNISS, EDWARD L. WHITMORE, CARLOS WARFIELD, and STEPHEN S. RAYMOND, Defendants.
} No. 66.

Bond.

Know all men by these presents: that we, the Boston and Montana Consolidated Copper and Silver Mining Company, a corporation, as principal, and Alex J. Johnston and J. K. Heslet as sureties, are held and firmly bound unto the Chile Gold Mining Company, a corporation, John MacGinniss, Edward L. Whitemore, Carlos Warfield and Stephen S. Raymond, in the full and just sum of five hundred dollars, to be paid to the said Chile Gold Mining Company, a corporation, John MacGinniss, Edward L. Whitmore, Carlos Warfield and Stephen S. Raymond, their attorneys executors administrators or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 15th day of March in the year of our Lord one thousand nine hundred and one.

Whereas, lately at a session of the circuit court of the United States, ninth circuit, district of Montana in a suit pending in said court, between the said Boston and Montana Consolidated Copper and Silver Mining Company, complainant and The Chile Gold Mining Company, a corporation, John MacGinniss, Edward
101 L. Whitemore, Carlos Warfield, and Stephen S. Raymond, respondents, the decree was entered against the said Boston and Montana Consolidated Copper and Silver Mining Company and the said company having obtained from said court an order allowing an appeal to the Supreme Court of the United States to reverse the decree of the aforesaid suit, and a citation directed to the said Chile Gold Mining Company, John MacGinniss, Edward L. Whitemore, Carlos Warfield and Stephen S. Raymond is about to be issued citing and admonishing them to be and appear at the Supreme Court of the United States to be holden at the city of Washington,

Now the condition of the above obligation is such that if the said Boston and Montana Consolidated Copper and Silver Mining Company shall prosecute its said appeal to effect, and shall answer all damages and costs that may be awarded against them, if they fail to

make their plea good, then the above obligation to be void; otherwise to be and remain in full force and effect.

ALEX J. JOHNSTON.
J. K. HESLET.

Sufficiency of sureties on the foregoing bond, approved the 16th day of March 1901.

HIRAM KNOWLES, *Judge.*

Bond on appeal. Filed and entered Mar. 16, 1901. Geo. W. Sproule clerk.

And thereafter to wit, on the 16th day of March 1901 a citation was duly issued herein which is hereto annexed.

102 *Citation.*

The President of the United States to the Chile Gold Mining Company, Edward L. Whitmore, Carlos Warfield, and Stephen S. Raymond, and Stapleton & Stapleton, their attorneys, and to John MacGinniss and John J. McHatton, his attorney, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, within sixty days from the date of this writ, pursuant to an appeal filed in the clerk's office of the circuit court of the United States, for the district of Montana, wherein The Boston and Montana Consolidated Copper and Silver Mining Company, is the plaintiff, and you are the defendants in error, to show cause, if any there be, why the judgment in said appeal mentioned should not be corrected and speedy justice should not be done the parties on that behalf.

Witness the Honorable Hiram Knowles, judge of the district court of the United States of America, district of Montana, this 16th day of March, 1901, and of the Independence of the United States the one hundred and twenty-fifth.

HIRAM KNOWLES,
United States District Judge, Presiding in the Circuit Court.

Attest:

{Seal United States Circuit Court, District of Montana, Southern Division, 1892.}

GEO. W. SPROULE, *Clerk.*

Due service of the foregoing citation on appeal, admitted by copy, at Butte, Montana, this 16th day of March, 1901.

JOHN J. McHATTON,
JOHN N. COTTER,
Attorneys for Defendants.

103 [Endorsed:] 66. In U. S. court. B. & M. Con. C. & S. M. Co. *v.* Chile G. M. Co. *et al.* Citation. Filed and entered Mar. 18 1901 Geo. W. Sproule, clerk. By T. B. Stephens, deputy clerk.

104 UNITED STATES OF AMERICA, }
District of Montana, } ss:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

I, George W. Sproule, clerk of the United States circuit court for the district of Montana, do hereby certify and return to the honorable the Supreme Court of the United States, that the foregoing volume, consisting of 104 pages, numbered consecutively from 1 to 104 inclusive, is a true and correct transcript of the pleadings, certificate of question of jurisdiction orders, exhibits and other proceedings had in said cause and of the whole thereof, as appears from the original records and files of said court in my possession; and I further certify and return that I have annexed to said transcript and included within said paging the original citation.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Helena, in the district of Montana, this 6th day of May, in the year of our Lord one thousand nine hundred and one, and of the Independence of the United States the 125th.

[Seal United States Circuit Court, District of Montana, 1890.]

GEO. W. SPROULE, *Clerk.*

Endorsed on cover: File No. 18,176. Montana C. C. U. S. Term No. 330. The Boston and Montana Consolidated Copper and Silver Mining Company, appellant, *vs.* The Chile Gold Mining Company, John MacGinniss, Edward L. Whitmore, Carlos Warfield, and Stephen S. Raymond. Filed May 21, 1901.

No. 104

FILED
APR 10 1902
JAMES H. MCKENNEY,
Clerk.

By J. Marshall for Appt.

Supreme Court of the United States,

OCTOBER TERM, 1901.

Filed April 10, 1902.

THE BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING COMPANY,

APPELLANT,

vs.

THE CHILE GOLD MINING COMPANY, JOHN MAC GINNIS, EDWARD L. WHITMORE, CARLOS WARFIELD and STEPHEN S. RAYMOND,

APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

APPELLANT'S BRIEF.

LOUIS MARSHALL,
JOHN F. FORBIS,
Appellant's Counsel.

APPEAL PRINTING CO., 41-45 Vesey Street, N. Y.

1380

Supreme Court of the United States,

OCTOBER TERM, 1901.

THE BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING COMPANY, Appellant, against THE CHILE GOLD MINING COMPANY, John MacGinniss, Edward L. Whitmore, Carlos Warfield and Stephen S. Raymond, Appellees.	Appeal and Certificate from Circuit Court of the United States, District of Montana. No. 330.

Appellant's Brief.

This cause involves precisely the same questions as the case of Boston and Montana Consolidated Copper and Silver Mining Company v. Montana Ore Purchasing Company, F. Augustus Heinze and Arthur P. Heinze, October Term, 1901, No. 329, which is argued herewith, on a record which is practically a *verbatim* reproduction of the record in that case; the only point of difference between

the two cases being that in this cause the Chile Gold Mining Company and the other defendants are sued as lessees of the Montana Ore Purchasing Company, they having as such lessees attempted to interfere with the complainant's rights of property (Rec., pages 1–18; 29–33).

The answer interposed by the Chile Gold Mining Company is practically the same as that of the Montana Ore Purchasing Company in No. 329.

An application was made by the defendants to dismiss the action upon the ground that there was no federal question presented by the allegations contained in the complainant's bill of complaint herein and the defendant's answer thereto, and the application was granted (Rec., page 36).

Thereupon, the question of jurisdiction was certified by the Circuit Court of the United States for the District of Montana to this Court, the concluding clause of the certificate being as follows:

"The Court further certifies that upon the said bill of complaint, and the said answer thereto, this Court sustained said application to dismiss and entered a decree of dismissal in accordance therewith, holding that a Federal question was not presented by said allegations and that in consequence thereof there was no jurisdiction in this Court in said action. The Court further certifies that the amount involved in said controversy as shown by said bill of complaint was in excess of two thousand dollars, exclusive of interest and costs" (Rec., pages 36–51).

The complaint has assigned errors in the decision and decree as follows:

First. In that the Court erred in dismissing the said action and entering the final decree in favor of the defendants.

Second. In that the Court erred in holding that it had no jurisdiction of the subject matter and

parties in the above entitled action and in dismissing the complainant's bill on motion of the defendant's (Rec., page 55).

As the argument of the questions arising in this case would merely constitute a re-statement of the argument in cause No. 329, the discussion of the questions involved as contained in appellant's brief and argument filed in that cause is hereby adopted as the appellant's argument herein.

It is respectfully submitted for the reasons that so urged that the decree of the Circuit Court of the United States for the District of Montana should be reversed and this cause remanded to that Court with instructions to proceed therewith.

LOUIS MARSHALL,
JOHN F. FORBIS,
Appellant's Counsel.

No.

In the

Supreme Court of the United States

October Term, 190

THE BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING COMPANY,

Plaintiff in Error,

vs.

THE MONTANA ORE PURCHASING COMPANY, F. AUGUSTUS HEINZE and ARTHUR P. HEINZE,

Defendants in Error.

In Error to the Circuit Court of the United States for the District of Montana.

BRIEF FOR PLAINTIFF IN ERROR ON MOTION TO DISMISS.

LOUIS MARSHALL,
Solicitor for Plaintiff in Error.

Supreme Court of the United States,

OCTOBER TERM, 1902.

No. 104.

BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING COMPANY,
Appellant,

AGAINST

CHILE GOLD MINING COMPANY, JOHN MACGINNISS, EDWARD L. WHITMORE, CARLOS WARFIELD and STEPHEN S. RAYMOND,
Appellees.

APPELLANT'S BRIEF IN REPLY.

The appellees have moved for a dismissal of the appeal herein on the same grounds as have been urged on their behalf in support of a similar motion in Case No. 102 on this docket.

Appellant's brief in reply in that cause sufficiently covers all questions arising herein, and to avoid repetition the Court is respectfully referred to that brief for a statement of the appellant's position.

LOUIS MARSHALL,
JOHN F. FORBIS,
Counsel for Appellant.

Office Supreme Court
FILED
NOV 17 1902
ROBERT T. BENDINEY,
Clerk.

No. 104.

SUPREME COURT

Brf. of Cotter for Appellees.

UNITED STATES.

Filed Nov. 17, 1902.

OCTOBER TERM, 1902.

NO. 104.

THE BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING COMPANY,

Appellant,

vs.

THE CHILE GOLD MINING COMPANY, JOHN MACGINNISS, EDWARD L. WHITMORE, CARLOS WARFIELD AND STEPHEN S. RAYMOND,

Appellees.

ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, NINTH CIRCUIT, DISTRICT OF MONTANA.

BRIEF FOR APPELLEES.

JOHN J. McHATTON,
JOHN W. COTTER,
Counsel for Appellees.

1380

The Supreme Court of the United States.

OCTOBER TERM, 1902.

NO. 104.

THE BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING COMPANY,

Appellant,

vs.

THE CHILE GOLD MINING COMPANY, JOHN MACGINNISS, EDWARD L. WHITMORE, CARLOS WARFIELD AND STEPHEN S. RAYMOND,

Appellees.

ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, NINTH CIRCUIT, DISTRICT OF MONTANA.

BRIEF FOR APPELLEES.

STATEMENT.

The appellant's statement is incorrect. We do not know why its counsel should have failed to state the true facts in this case and in Cause No.

103. The statements contained in appellant's brief are inaccurate and there is contained in the brief in Cause No. 103 reference to matters alleged to exist, but which are not shown by the record. The Court, of course, will not look beyond the record or consider any matter not contained therein or shown thereby to exist. There was no application to dismiss the action as stated by the appellant. The appellant refers to the bill of exceptions. (P. 36.) The fact is that the cause was determined by the United States Circuit Court of Appeals, Ninth Circuit. Its mandate directing the dismissal of the bill for want of jurisdiction appears on page 34 of the record; the judgment entered in accordance with said mandate appears on page 35. The appellant is not seeking to review any judgment of the Circuit Court for the Ninth Circuit, but it is endeavoring to review the decree of the United States Circuit Court of Appeals.

Chile Gold Min. Co. et al. vs. Boston & M. Consol. Copper and Silver Min. Co. 93 Fed. 987.

I.

ON THE MOTION TO DISMISS.

By reference to the complaint (record, 1), it will be seen that the cause of action attempted to be alleged therein is:

1. That the complainant is the owner and entitled to the possession of the portion of the Pennsylvania lode claim described therein.

2. That the defendants entered in the premises and extracted ores therefrom.

3. That said ores were of the value of $75,000.

4. That the defendants have continued to mine ores therefrom and will continue to do so unless enjoined by the order of the Court.

5. That the ground is valuable almost exclusively for the ores therein contained, and which the defendants are threatening to extract, which are of the value of more than $50,000.00.

6. That the complainant has no means of knowing the quantity and value of the ores which will be extracted by the defendants, and that unless it is enjoined the complainant will be obliged to begin a multiplicity of suits.

We submit that this complaint showed no jurisdiction in the Circuit Court; it does not disclose the existence of any federal question or that it will

be necessary that the Constitution or any law of the United States should be construed in the determination of the action. The allegations contained in the complaint and placed therein in an attempt to disclose the existence of a federal question are immaterial and irrelevant, and are no part of a statement of the plaintiff's alleged cause of action.

The appeal here is sought to be taken:

1. Not from a judgment of the United States Circuit Court, but from a judgment of the United States Circuit Court of Appeals. The appeal should be dismissed.

Aspen M. & S. Co. vs. Billings, 150 U. S. 31.

2. The complaint does not show the existence of any federal question, or that a construction of the Constitution of the United States or any law of the United States is necessarily involved in the determination of the action. We think it clear that, aside from the failure of the complaint to present any federal question or to show that the action involves the construction of the Constitution or any law of the United States, that the same fails to show jurisdiction in the United States Circuit Court for the reason that it does not show that the complainant was in possession of the premises claimed to be owned by it at the time of the commencement of the action.

We refer the Court to the following cases and the authorities therein cited:

Cosmos Exploration Co. vs. Gray Eagle Co., 112 Fed. 4;

U. S. Mining Co. vs. Lawson, 115 Fed. 1005.

In further support of this motion we beg to refer the Court to, and have it consider, the appellees' brief filed in Cause No. 103.

II.

ON THE MOTION TO AFFIRM AND ON THE MERITS.

We respectfully submit that the motion to affirm should be sustained on the grounds:

1. That this appeal is not taken from a final judgment of the Circuit Court of the Ninth Circuit, District of Montana, but was sought to be taken from the judgment of the United States Circuit Court of Appeals for the Ninth Circuit.

2. Because the facts stated in the complaint are not sufficient to show that the Circuit Court had jurisdiction in that it appears that the complainant was not in possession at the time the action was brought, and in that it further appears that

no federal question was involved. It is plainly evident that the plaintiff's statement of its cause of action does not involve the consideration of the construction of the Constitution or any law of the United States.

For further discussion and the authorities in support thereof we beg to refer the Court to appellees' brief filed in Cause No. 103, and to have the same considered by the Court in determination of this case.

We confidently pray the judgment of the Court in favor of the appellees.

Respectfully submitted,

JOHN J. McHATTON,
JOHN W. COTTER,
Counsel for Appellees.

Supreme Court of the United States.

No. 102.—October Term, 1902.

The Boston and Montana Consolidated Copper and Silver Mining Company, Plaintiff in Error, vs. The Montana Ore Purchasing Company et al.	In error to the Circuit Court of the United States for the District of Montana.

[February 23, 1903.]

Mr. Justice Peckham delivered the opinion of the Court.

This case arises upon demurrer to the complainant's complaint. The demurrer was sustained and the complaint dismissed, and judgment given for the defendants, and thereupon the circuit judge certified the question of jurisdiction to this court.

The action was brought to recover $500,000 damages sustained by the plaintiff in error by reason of the wrongful taking of ore of that value from the mining claim of the plaintiff in error. Substantially the same averments are made in the complaint as in the case which immediately precedes and the questions involved are the same, excepting that the former is a suit in equity and this is an action at law.

For the reasons stated in the opinion in No. 103, the judgment in this case is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 103.—October Term, 1902.

The Boston and Montana Consolidated Copper and Silver Mining Company, Appellant, *vs.* The Montana Ore Purchasing Company et al.	Appeal from the Circuit Court of the United States for the District of Montana.

[February 23, 1903.]

The appellant in this case (being the complainant below) has brought it to this court by an appeal from the judgment of the Circuit Court of the United States for the District of Montana dismissing its complaint and ordering judgment for the defendants on the ground that the court had no jurisdiction of the action. A decree having been entered in accordance with the direction of the court dismissing the bill, the Circuit Court has certified to this court the question of jurisdiction, and whether or not a Federal question is presented in complainant's amended bill and the answer of the defendant corporation.

The cause of action relates to the ownership of a certain quantity of copper ore taken and converted by the defendants from the mining ground alleged to be owned by the complainant. For the purpose of presenting the question of jurisdiction, the court below has certified to this court the amended bill and the answer of the defendants. The complainant in the bill alleges that it is the owner and entitled to possession of certain property therein described, known as and called the Pennsylvania lode mining claim, lot No. 172, situated in Summit Valley mining district, county of Silver Bow, Montana. A full description of the land is given in the bill. The complainant's title is next set out with much particularity and detail, from which it appears that the original source of its title is a United States patent covering the claim, dated April 9, 1886, issued to persons named therein, from whom the complainant deraigns title. It is then averred that on April 1, 1895, defendants wrongfully and unlawfully entered upon complainant's premises, and from that time on extracted from the mine large quantities of valuable ores, of the reasonable value of $500,000, and that they have continued to extract and mine ores from the premises belonging to the complainant, and are now mining and extracting ores therefrom and threatening to continue to do so unless enjoined by the court.

The land which the complainant claims to own is valuable almost exclusively for the copper, silver and gold ores which are found there in

large quantities, and it is these ores that the defendants have extracted and are threatening to continue to extract in the future.

It is averred that the complainant has no means of ascertaining the quantity or value of the ores which the defendants have extracted or may hereafter extract from such premises, and if the defendants are permitted to continue to extract such ores it will be altogether uncertain and indefinite as to what the amount or the value of such ores may be, and the complainant will be compelled to rely to a great extent on the defendants as to such amount and value; that unless the defendants are enjoined and restrained from taking the ores the complainant will be required to bring numerous actions for the determination of the damages it has from time to time sustained by reason of such trespasses, which are continuing on the part of the defendants. Therefore the complainant brings this suit in order to avoid a multiplicity of suits in the premises; and by reason of the trespasses of the defendants and their threatened continuance the complainant has suffered and will suffer great and irreparable injury and damage, unless the defendants are enjoined from further trespass as prayed for.

This is the complainant's cause of action, as set forth in the bill, regarding the trespass and the injury inflicted and the difficulty of proof thereof and the prevention of a multiplicity of suits.

The complainant then further averred in the bill, for the purpose as therein stated, of showing the jurisdiction of the court to determine the matters set forth in such bill, that the determination of the controversy between the parties involved the construction of the mining laws of the United States; that the property of the complainant is a mining claim and has been patented as such under the provisions of the Revised Statutes of the United States relating to mines and mineral lands; that the defendants owned a portion of certain properties called the Rarus lode claim, lot No. 179; the Johnstown lode claim, lot No. 173; and the Little Ida lode claim, lot No. 126, which claims lie north of and partially adjoining and near to the Pennsylvania lode claim, owned by the complainant.

It is further stated that the various claims which are and will be made by the defendants as to their rights in complaintant's mine by reason of their ownership of the other mines above mentioned are without foundation, yet, nevertheless, they will be urged as a defense to the cause of action set forth in the bill of complaint, and the claims of defendants are denied and disputed, as are also the facts upon which the defendants base their defense, and the law arising from the same, and complainant adds "that it disputes each and every one of the claims made by the defendants, relative to the construction of said several patents, and it (complainant) claims that all veins, whose apexes lie within the Johnstown patent must be governed and regulated in extralateral rights, if any they have,

under the Johnstown patent, and not under or by virtue of the Rarus patent." The complainant also averred "that the said defendants contend and claim that the complainant cannot under any circumstances obtain any relief for ores extracted within that portion of the premises owned by it, without first showing that the apices of the veins from which the ores were extracted are within the surface lines of the ground owned and claimed by the complainant, whereas your orator claims that *prima facie* it is the owner of all ores found within its boundaries extended downward into the earth, until it has been shown that some other person or company has some right thereto by reason of ownership of the apex of the vein within some other claim." The complainant further stated its right to enjoin defendant from mining ore beneath the ground of complainant, because no vein having its apex in the defendant's claim passes in its strike through the end lines thereof so as to confer extralateral rights.

And finally: "Wherefore, your orator shows to your honors that there is involved in the matters in controversy, between your orator and the said defendants, the numerous questions aforesaid, involving the construction of the statutes of the United States, relative to locating, purchasing and patenting of mineral lands and the construction of the statutes, relative to the right of one claimant to follow veins down to and into the premises of another, under the circumstances and situation of the parties as hereinbefore set out, and also the construction of the said statutes in relation to patenting of claims and whether the vein can be patented to one person and the surface to another, and to the right of the Land Department to segregate the surface from the mineral in the ground, granting one to one person and the other to another, and as to whether said action is authorized under and by virtue of said statutes; and also as to whether, when an apex of a vein is divided upon the surface, part being within the premises granted in one patent and a part within another, as to what, if any extralateral rights, are granted under such circumstances to either party."

The answer of the defendants is also set forth in the certificate of the court below, in which the defendants deny that they wrongfully or unlawfully entered the premises of the complainant or that they took out any amount of ore belonging to the complainant from that mine, and deny that the defendants ever mined or extracted ores from premises belonging to the complainant or threatened to do so; also deny the averments as to the value of the ore as set forth in the bill. Defendants also deny that the determination of the controversy between the parties involves a construction of the mining acts of the United States or the construction of any statute of the United States whatever. They admit that the Rarus and the Johnstown lode claims are mineral claims, located

under the laws, of the United States, and that the same have been patented under those laws, and that the defendants own a portion of the lode called the Rarus lode claim. The defendants also assert that they are the owners of a certain parcel of ground within the Johnstown lode claim, and also the owners of that portion of the Pennsylvania lode claim thereafter described, and they claim the right to enter upon the premises of the complainant, namely, that portion of the Pennsylvania lode claim described in its amended bill of complaint, by reason of the fact that certain veins owned and claimed by the defendants and in their possession have their dip or apices within the Johnstown lode claim, lot No. 173, and that portion thereof owned by the defendants, and that the defendants assert the right to follow such veins on their downward course or dip, although the same so far depart from a perpendicular as to depart from the said Johnstown lode claim and from that portion thereof claimed by the defendants, and enter the premises owned and claimed by the complainant, namely, that portion of the Pennsylvania lode claim described in its amended bill of complaint. But the defendants deny that they claim the right to enter complainant's premises by reason of the fact that any veins owned or claimed by them or in their possession have their top or apices within the Rarus lode claim or in that portion thereof owned by the defendants, or by reason of the fact that the same have their top or apices within the Little Ida lode claim or any portion thereof, and deny that the defendants assert the right or any right to follow such veins on their downward course or dip, although the same so far depart from a perpendicular as to depart from said Rarus lode claim, and to enter the premises claimed by the complainant; and deny that they assert or claim the right to enter the premises of the complainant by reason of the fact that any veins owned or claimed by the defendants have their top or apices within that portion of the Johnstown lode claim owned by the defendant, or that they assert the right to follow such veins on their downward course or dip, although the same so far depart from a perpendicular as to depart from the Johnstown lode claim and from the portions thereof owned by the defendants and enter the premises of the complainant.

It was further averred in the answer "that in this action it makes no claim of any right under the Rarus patent to enter upon the veins within the ground claimed or owned by the complainant, but that it asserts its right to do so by reason of its ownership of a portion of the Johnstown lode claim, and the fact that the top or apices of the veins or lode in question are within said portion of the Johnstown lode claim." It also "denies that in this action it contends or claims that only the surface ground of the Johnstown claim was patented to the patentees named therein or that all or any veins lying within the original location lines of

the Rarus claim were patented to the claimant under the Rarus claim; . . . but defendant alleges that it contends and claims in this action, and in so far as this controversy between complainant and defendant is concerned, that its extralateral rights to the veins in question should be determined by its ownership of that parcel of ground now included within the Johnstown claim and not by the Rarus, for the reason that said veins or lodes have their tops or apices within the said parcel of ground owned by defendant."

Various other denials were made, from which it appears that the only claim made by the defendants in this action is by virtue of their ownership of the Johnstown lode claim. The defendants by this answer therefore admit the averments in the bill that their rights must be governed and regulated in this action by reason of their ownership of the Johnstown patent, and not by virtue of the Rarus patent, and as to those rights the complainant claims that the course of the vein cannot be followed because of the nature of the ground.

Mr. Justice PECKHAM, after making the foregoing statement of facts, delivered the opinion of the Court.

It is quite plain that the various averments contained in the complainant's bill for the purpose of showing jurisdiction in the Circuit Court are wholly unnecessary in order to make out complainant's cause of action for the conversion of ore by the defendants on premises belonging to complainant. To make out a *prima facie* case on the part of complainant, so far as its right to the ore in question is concerned, all that was necessary was to show the patent and the complainant's possession under it, and from such patent and possession the presumption would be that the complainant was the owner of all ores found within the boundaries contained in the patent extended downward into the earth, and the burden would then rest upon the defendants to show that, notwithstanding such presumption, they had the right to enter upon and take the ore from the ground within the limit described in the patent under which the complainant derives title. It could then prove facts to sustain its averments in regard to ascertaining the quantity and value of the ores which the defendants were extracting or might extract from the complainant's premises, and that it would be altogether uncertain and indefinite as to what amount of ores or the value thereof the defendants might extract in the future, and that the complainant would be compelled to rely upon the good faith and showing of the defendants as to the amount and value of the ores which they had theretofore extracted and might thereafter extract from the premises. Indeed, the complainant asserted in the bill, an extract from which is contained in the foregoing statement, that *prima facie* it is the owner of all

ores found within its boundaries extended downwards into the earth, until the contrary has been shown. It would be wholly unnecessary and improper in order to prove complainant's cause of action to go into any matters of defense which the defendants might possibly set up, and then attempt to reply to such defense, and thus, if possible, to show that a Federal question might or probably would arise in the course of the trial of the case. To allege such defense and then make an answer to it before the defendant has the opportunity to itself plead or prove its own defense is inconsistent with any known rule of pleading so far as we are aware, and is improper.

The rule is a reasonable and just one that the complainant in the first instance shall be confined to a statement of its cause of action, leaving to the defendant to set up in his answer what his defense is and, if anything more than a denial of complainant's cause of action, imposing upon the defendant the burden of proving such defense.

Conforming itself to that rule the complainant would not, in the assertion or proof of its cause of action, bring up a single Federal question. The presentation of its cause of action would not show that it was one arising under the Constitution or laws of the United States.

The only way in which it might be claimed that a Federal question was presented would be in the complainant's statement of what the defense of defendants would be and complainant's answer to such defense. Under these circumstances the case is brought within the rule laid down in *Tennesse* v. *Union & Planters' Bank*, (152 U. S. 454.) That case has been cited and approved many times since, among the latest being *Arkansas* v. *Kansas &c. Railroad*, (183 U. S. 185,) where it was stated by Mr. Chief Justice Fuller, speaking for the court, at page 188, as follows:

"Hence it has been settled that a case cannot be removed from a State court into the Circuit Court of the United States on the sole ground that it is one arising under the Constitution, laws or treaties of the United States, unless that appears by plaintiff's statement of his own claim; and if it does not so appear, the want of it cannot be supplied by any statement of the petition for removal or in the subsequent pleadings. And moreover, that jurisdiction is not conferred by allegations that defendant intends to assert a defense based on the Constitution or a law or treaty of the United States, or under statutes of the United States, or of a State, in conflict with the Constitution." See also *Blackburn* v. *Portland &c. Co.*, (175 U. S. 571;) *Shoshone &c. Co.* v. *Rutter*, (177 Id. 505.)

The test of the right of removal is that the case must be one over which the Circuit Court might have exercised original jurisdiction under section 1 of the act of March 3, 1887, as corrected by the act of August 13, 1888, (24 Stat. 552; 25 Stat. 433.) The cases hold that to give the Circuit Court original jurisdiction the Federal question must appear neces-

sarily in the statement of the plaintiff's cause of action, and not as mere allegations of the defense which the defendants intend to set up or which they rely upon. (*Third Street Railway Co.* v. *Lewis*, 173 U. S. 457.)

It is urged, however, on the part of the complainant that its averments in regard to the jurisdiction of the court are necessary to be set forth as a part of its cause of action, and that they show that the appellees are questioning complainant's title and interfering with its enjoyment of its property right by asserting ownership to a portion of such claim of complainant based upon two government patents issued for the Rarus and Johnstown claims respectively, and although such assertion of ownership of the appellees is, as complainant avers, without legal foundation, yet, for reasons stated in the bill, the consideration of which necessitates an examination of Federal questions, the case is in effect one to quiet complainant's title or to prevent an interference with its rights and property, and complainant avers that the allegations of jurisdiction relate to its cause of action; that they state the controversy existing between the parties as to its subject matter, not as anticipatory of the defense, but as establishing the complainant's right to have its title quieted.

But it is plain that the suit is not in truth a suit to quiet title. There is a cause of action alleged that is not founded upon any such theory, to prove which it is not necessary or proper to go into the defendants' title or to anticipate its defense to the cause of action alleged by the complainant. What is thereafter said is for the purpose of showing jurisdiction in the Federal court, not over an equitable cause of action in the nature of a bill to quiet title, but over a cause of action arising out of the laws of the United States; and the various mining laws of the United States are cited to show the truth of the assertion. It is also clear that jurisdiction in a Federal court cannot be predicated in this case upon an assertion that it is brought to prevent a multiplicity of suits. Even then the complainant's proof in the first instance would remain the same as already stated. The frequent trespasses, as alleged, of the defendants, by reason of which an equitable remedy by injunction is sought, might exist, and still it would not necessarily appear from the complainant's proof that the defendant's justification arose by reason of an alleged right under the Constitution or laws of the United States. That might appear in the defense, but would constitute no cause of action by complainant.

If, however, the bill is to be looked upon as one in the nature of a bill of peace or to quiet title, it is fatally defective in that aspect. There are two distinct kinds or classes of bills of peace, or bills to quiet title, the one brought for the purpose of establishing a general right between a single party and numerous persons claiming distinct and individual interests; the other for the purpose of quieting complainant's title to land against a single adverse claimant. In the second class the suit can be maintained by a party

in possession against a single defendant ineffectually seeking to establish a legal title by repeated actions of ejectment, and in such case it is necessary to aver that the title of complainant has been established by at least one successful trial at law before equity will entertain jurisdiction. (3 Pom. Eq. Jurisprudence, 2d ed. sec. 1394, note 3, and 1 Pom. Id. sec. 246.)

This bill evidently would come under the second of these classes, and it is defective in not containing an averment that the complainant's title has been at least once successfully tried at law. On the contrary, it appears from the bill itself that an action at law has been commenced involving the same questions, but has not been tried.

It is also objected that, as a bill of peace or to quiet title, it is defective, because there is no allegation that the complainant was in possession, which is necessary in such a bill. If not in possession, an action of ejectment would lie. The contention that under the Code of Montana a person not in possession may maintain an action to quiet title cannot prevail in a Federal court. (*Whitehead* v. *Shattuck*, 138 U. S. 146.)

The complainant fails, on both these grounds, to show that its bill is sufficient as one to quiet its title, and it therefore fails to show that the case is not covered by the *Union & Planters' Bank*, and other cases, above cited. If the bill do not contain facts sufficient to constitute it a bill to quiet title, all the averments as to defendant's claims as defenses, and complainant's answers thereto, are only material for the purpose of showing that the defense may disclose facts which will show a case arising out of the mining laws of the United States. But this would not constitute complainant's cause of action.

But assuming for this purpose (what is otherwise denied) that the bill is sufficient to confer jurisdiction, it is so only because of its averments as to the defense to be made by the defendants to the complainant's cause of action. When we come to examine their answer we find that defendants disclaim any right under the patent for the Rarus lode claim, and confine their alleged rights to such as exist by virtue of their ownership of the Johnstown lode claim only. Defendants' claim of right to follow the veins which they aver have their top or apices in the Johnstown patent is denied by complainant. It sets up in the bill that it denies and disputes the fact that the veins upon which defendants have mined in the claim of complainant, even if such veins had their apices in defendants' ground, (which complainant does not admit,) are yet such veins as can be followed on their dip beyond the lines of defendants' possessions into the ground of complainant, and complainant alleges that the veins are broken and intersected by faults in such a manner that the same cannot be traced or followed from the ground of defendants into that of the complainant, and therefore defendants have no right to enter upon the ground of com-

plainant for the purpose of extracting ores therefrom by reason of their ownership of the apices of any veins within their ground. There is the further fact alleged that the veins, if any, which have their apices in defendants' claim, do not pass in their strike through the end lines of defendants' claim. This alleged inability to follow the veins, assuming that they apex in the defendants' Johnstown patent, and the allegation as to the veins not passing through end lines, are mere questions of fact, depending upon the proof as to the truth of those averments. This does not constitute a question arising out of the Constitution or laws of the United States. The answer, by its denials and disclaimers as to what it sets up by way of defense, takes away a defense which might show the case as arising under such Constitution or laws.

Complainant contends, however, that if a case of jurisdiction is made out by the bill, the court is not ousted thereof by whatever is set up in the answer. In this case the contention cannot be maintained. The only foundation for the alleged jurisdiction consists of the averments of complainant relative to the contention of the defendants as to their defense. Now, if it appear from the answer of defendants that no such claim as is necessary to give the court jurisdiction is in fact made, but on the contrary is disclaimed and denied, then the basis of jurisdiction fails and the court cannot proceed. This is so held in *Robinson* v. *Anderson*. (121 U. S. 522, 524.) In that case Mr. Chief Justice Waite, speaking for this court and delivering its opinion, said :

"Even if the complaint, standing by itself, made out a cause of jurisdiction, which we do not decide, it was taken away as soon as the answers were in, because if there was jurisdiction at all it was by reason of the averments in the complaint as to what the defenses against the title of the plaintiffs would be, and these were of no avail as soon as the answers were filed and it was made to appear that no such defenses were relied on." See also *Crystal Springs &c. Co.* v. *City of Los Angeles*, (82 Fed. Rep. 114, affirmed 177 U. S. 169.)

Jurisdiction in this class of cases must be based upon the fact that the case is one arising under the Constitution or laws of the United States. If it appear to be such in the plaintiff's pleading simply because of the allegations as to what the defenses are on the part of the defendant, if when the answer come in it is seen that no such defense in fact is set up or insisted upon, it is then seen that no such case exists as stated in the complaint, and no jurisdiction therefor exists to try questions which are not of a kind coming within the statute, and the court should then dismiss for want of jurisdiction.

The complainant also objected that the defendants did not properly or effectively disclaim or deny the allegations of the complainant's bill.

In relation to the evasive character of the answer it was stated by Circuit Judge Gilbert in 93 Fed. Rep. 274, in regard to this case, as follows:

"It is objected that the denials of the answer do not fully and explicitly traverse the new averments of the amended bill, but that they are denials only that the defendant relies in 'this action' upon the alleged rights and claims, and that the defendant disclaims only for the purpose of this present suit, without waiving its right to assert such claims in some other suit or proceeding hereafter. No exception, however, was taken to the answer for insufficiency. It was accepted as responding to the allegations of the amended bill. We think it was properly so accepted. If, in view of some possible other action affecting other interests, the defendant has attempted to reserve the privilege to assert other rights under the Rarus patent, it is immaterial to the present controversy. It is only to the rights asserted by the complainant in this suit that the defendant must make answer. It is required to make its defense to the allegations of the bill, and to show cause why the relief prayed for should not be decreed. It has answered as to its rights to extract the ores in question. It says that it claims nothing by virtue of the Rarus patent, but that it relies solely upon the fact that the ores it has taken belong to a vein which has its apex in the Johnstown lode claim, and in its strike passes through the end lines of said claim, and in its downward course extends beneath the surface of the complainant's claim. Upon such a bill and such an answer all questions concerning the right of the defendant to mine the ores in controversy are determinable, and the decree, if against the defendant, would be as effective to bar it from hereafter asserting rights under the Rarus patent as would be a decree upon any other form of answer."

We concur in the views thus expressed, and the result of the whole case is that the complainant failed to show any jurisdiction in the Circuit Court to try this case, and the order of the Circuit Court dismissing complainant's bill and giving judgment for the defendant is, therefore,

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.

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True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 104.—October Term, 1902.

The Boston and Montana Consolidated Copper and Silver Mining Company, Appellant, *vs.* The Chile Gold Mining Company et al.	Appeal from the Circuit Court of the United States for the District of Montana.

[February 23, 1903.]

Mr. Justice Peckham delivered the opinion of the Court.

This case involves the same questions as that of the *Boston and Montana Consolidated Copper and Silver Mining Company* v. *The Montana Ore Purchasing Company &c.*, (No. 103,) the only point of difference between the two being that the Chile Gold Mining Company and the other defendants herein are sued as lessees of the Montana Ore Purchasing Company, they having as such lessees attempted to interfere with the complainant's right of property. The complaint was dismissed for want of jurisdiction.

For the reasons stated in the opinion in No. 103, this decree is also

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.